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IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 1163

UNITED MINE WORKERS OF AMERICA,
Petitioner,

v.

TENNESSEE CONSOLIDATED COAL COMPANY
and GRUNDY MINING COMPANY,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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IN THE

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UNITED MINE WORKERS OF AMERICA,

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v.

TENNESSEE CONSOLIDATED COAL COMPANY and GRUNDY MINING COMPANY,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Petitioner United Mine Workers of America prays that a Writ of Certiorari issue to review: (1) the judgment of the United States Court of Appeals for the Sixth Circuit entered September 19, 1969 in Case No. 18,820, styled *Tennessee Consolidated Coal Company and Grundy Mining Company, Plaintiffs-Appellees v. United Mine Workers of America, Defendant-Appellant,*[1] where-

[1]Herein the United States Court of Appeals for the Sixth Circuit is called *"Sixth Circuit"*; the United States District Court for the Eastern District of Tennessee, Southern Division, *"trial court" or "district court"*; United Mine Workers of America, *"UMW"*; Tennessee Consolidated Coal Company, *"TCC"*; and Grundy Mining Company, *"Grundy"*.

in the Sixth Circuit affirmed the judgments entered by the United States District Court for the Eastern District of Tennessee, Southern Division (A. 25a, 81-85a)[2] in TCC's favor for $1,432,500.00 and an attorney's fee of $143,250.00 and in Grundy's favor for $67,500.00 and an attorney's fee of $6,750.00 and costs, respectively, after sustaining a jury's conspiracy finding and overruling UMW's motion for judgment or, in the alternative, for a new trial (96-102a); (2) the Sixth Circuit's order (A. 35a) entered November 14, 1969, denying UMW's petition for rehearing en banc; and (3) the Sixth Circuit's order entered November 21, 1969, allowing $10,000.00 "for attorneys' fees for services rendered in this Court" (A. 36a).

A certified record in said case, together with proceedings in the Sixth Circuit, is furnished herewith, in accordance with the Rules of this Court.

OPINIONS BELOW

The district court's opinion appears in Appendix B hereto (A. 37a, et seq.) and in the certified record (102-43a). The Sixth Circuit's opinion appears in Appendix A hereto (A. 1-25a), in the certified record and it is reported in 416 F.2d 1192.

JURISDICTION

The judgment of the Sixth Circuit was entered on September 19, 1969. A timely petition for rehearing en banc was denied on November 14, 1969, and this Petition for Certiorari is filed within 90 days of that date. This Court's jurisdiction is invoked under 28 USCA 1254(1) and 2101(c).

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[2]The abbreviation "A." refers to the Appendix to this Petition. Other references (followed by the symbol "a") are to the page numbers of the Joint Appendix which is a part of the certified record filed in this Court's Clerk's office pursuant to Rule 21.

Unless otherwise indicated, all emphases are supplied.

QUESTIONS PRESENTED

1. In light of the antitrust immunity of labor unions and national labor policy, was there substantial evidence under the clear proof requirement of Section 6 of the Norris-LaGuardia Act to warrant the jury's verdict of conspiracy under the Sherman Antitrust Act?

2. Where a labor union is charged with having conspired with employer groups in violation of the Sherman Antitrust Act when it executed an industry-wide, multi-employer collective bargaining agreement, and there is no direct evidence proving the conspiracy and Union denials thereof are uncontradicted, did the Sixth Circuit err in approving the district court's failure and refusal to determine the meaning and validity of the Protective Wage Clause, as a matter of law, and in submitting its meaning and validity to the jury for its determination?

3. In light of the antitrust immunity of labor unions and national labor policy, where a labor union is charged with having conspired with employer groups in violation of the Sherman Antitrust Act in executing an industry-wide, multi-employer collective bargaining agreement, is it legally permissible for a court or jury to infer the existence of a conspiracy from effects and consequences of that agreement?

4. Did the Sixth Circuit err in holding that Section 6 of the Norris-LaGuardia Act does not require the unlawful act of conspiracy, upon which this action is based, to be shown by clear proof?

5. In light of the antitrust immunity of labor unions, the clear proof requirement of Section 6 of the Norris-LaGuardia Act and national labor policy, did the Sixth Circuit err in approving the district court's jury charge regarding (a) the applicable standard of proof, (b)

effects and consequences of acts of alleged conspirators, (c) jury determination of the Protective Wage Clause's meaning and validity, and (d) specific intent?

6. Did the Sixth Circuit err in approving the district court's interpretation of the jury's General Verdict and in holding that Rule 49(b), Federal Rules of Civil Procedure, barred United Mine Workers of America from complaining that the district court had misinterpreted the jury's General Verdict in holding it was not dependent upon the jury's finding as to the Protective Wage Clause?

7. Did the Sixth Circuit's approval of the jury's verdict on damages collide with national labor policy, and did it lack substantial evidentiary support under the Sherman Antitrust Act?

8. Was there error in the Sixth Circuit's refusal to strike the jury panel on the ground that the system used by jury commissioners failed to produce a venire reflecting a fair cross-section of the community?

CONSTITUTIONAL AND STATUTORY PROVISIONS AND RULES INVOLVED

Statutory provisions involved are Sections 1 and 2, Sherman Antitrust Act (15 USCA 1 and 2); Sections 4 and 6, Clayton Act (15 USCA 15 and 17); Section 20, Clayton Act (29 USCA 52); Sections 2, 4 and 6, Norris-LaGuardia Act (29 USCA 102, 104 and 106); Section 1, National Labor Relations Act, as amended (29 USCA 141); Sections 1, 7, and 8(e), Labor Management Relations Act, 1947 [29 USCA 151, 157 and 158(e)], as well as Rule 49(b), Federal Rules of Civil Procedure.[3] Involved

[3]These statutes are herein called *Sherman, Clayton, Norris-La Guardia* and *Taft-Hartley,* respectively. Pertinent Constitutional and statutory provisions, as well as Rule 49(b), are found in Appendix C to this brief, pp. 86-98a.

also are the Seventh Amendment to the Constitution of the United States and Sections 1861-64 of Title 28 USCA.

STATEMENT OF THE CASE

A. The Judgments Appealed

This action involves implementation of this Court's guidelines in *Pennington v. UMW*, 381 U.S. 657 (1965) relating to UMW's exemption as a labor union from *Sherman's* proscriptions.

In 1964, TCC, a Tennessee corporation, and Grundy, a TCC wholly-owned subsidiary formed in 1959, alleged a UMW-major coal company conspiracy[4] to force small companies out of business in violation of *Sherman's* sections 1 and 2, sought treble damages from UMW under Clayton's Section 4 (15 USCA 15) from September, 1959 through 1963.[5]

UMW denied the conspiracy. It averred its exemption status as a labor organization within the Clayton Act's Section 6 (15 USCA 17); negotiation and execution of the several Agreements by it as a labor organization and its conduct in their enforcement did not constitute *Sherman* violations; all UMW acts and conduct were motivated by legitimate labor goals to secure uniform labor standards of wages and working conditions for its members pursuant to its long-existent policy; the 1958 Agreement's Protective Wage Clause (PWC) sought to prevent signatory operators from vitiating the National Agreement and to assure the maximum possible employment continuity for UMW members (52-74a).

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[4]Named as the conspirators with UMW were (40a): West Kentucky Coal Co., Bituminous Coal Operators Association, Consolidation Coal Co., Peabody Coal Co., Nashville Coal Co., Island Creek Coal Co., The Pittston Co. and Pittsburgh-Midway Coal Co.

[5]Plaintiffs' complaint appears at pp. 21-32a in the certified record and its theories at pp. 40-52a; UMW's answer at pp. 33-39a and its theories at pp. 52-74a.

UMW further contended TCC ceased producing coal in March, 1960, and thereafter acted as a coal sales agency or land company, and hence had no standing to maintain the present antitrust action as its injury was too remote and indirect to permit it to sue (73a).

In a jury trial, UMW motions for directed verdict were denied (910-13a, 1688-90a). The case was submitted to the jury on a "General Verdict Form" and, over UMW objections, on three "Special Issues" (1762-67a). On the "General Verdict Form", the jury found UMW engaged "in a conspiracy, as alleged by the plaintiffs, to unreasonably restrain trade or to monopolize commerce in the bituminous coal industry outside or beyond the exemption granted by the antitrust statutes to a labor organization and in violation of" *Sherman's* Sections 1 and 2 (93a; A. 46-47a). The jury answered Special Issue No. (1), finding UMW "did so act as to forfeit its exemption under the anti-trust laws" (94a; A. 47a). As to Issue No. (2), the jury found, "*prior to and apart from the National Bituminous Coal Wage Agreement as amended in 1958, the defendant, United Mine Workers of America did not conspire, combine or contract with the coal operators who signed the National Agreement that it would contract with non-signatory operators only upon the terms and conditions of the*" *National Agreement* "*as amended from time to time*" (94a; A. 48a). As to Issue No. (3), the jury found UMW and signatories to the National Agreement "did intend that by the terms of" PWC, UMW agreed "that it would contract with non-signatory operators only upon the" National Agreement's terms (94-95a; A. 48a).

The jury awarded TCC $977,500.00 and Grundy $22,-500.00 (A. 47a; 1780-83a). UMW moved to set aside the jury verdict and for judgment in its favor in accordance

with its motion for directed verdict, or for a new trial (96-102a). A district court opinion (A. 37-81a) denied the motions, found the verdict excessive as to TCC and suggested a remittitur of $500,000.00, which TCC accepted (148a). On May 8, 1968, the district court entered judgments against UMW in amounts noted (*ante*, p. 2), the respective judgments being three times the jury's verdict as remitted (12a, 144-47a).

Upon appeal, the Sixth Circuit affirmed the judgments (A. 25a).

B. The Conspiracy Issue

Prior to the instant case's trial, its presiding judge[6] rejected the claim of southeast Tennessee coal operators that UMW conspired with non-labor groups in violation of *Sherman*. *Ramsey v. UMW*, DC, E.D. Tenn., S.D., 1967, 265 F.Supp. 388.[7] Herein, the district court noted, "the evidence followed very closely" that in *Ramsey*. The "only significant differences", the district court herein avowed, are *Ramsey's* evidence of violence omitted upon the present trial and the "additional evidence not introduced" in *Ramsey* with respect to PWC, which consisted "principally of the minutes of the Joint Industry Contract Committee" (JICC) following the 1958 Agreement (A. 45a). Those minutes, read to the jury, *and they are undisputed*, are discussed, *post*, pp. 24-25.

As in *Ramsey*, UMW officials and other witnesses denied the charged conspiracy and making any agreement other than the National Agreement. As in *Ramsey*, these denials were undisputed; and *Ramsey* declared

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[6]Honorable Frank W. Wilson, District Judge, heard both *Ramsey* and the case at bar.

[7]Affirmed, *Ramsey* v. *UMW*, 6 Cir., 72 LRRM 2321 (1969) by an equally divided court. In the instant case, the district court expressly adopted its *Ramsey* opinion and relied thereon (A. 45-46a).

such testimony "cannot be ignored" (265 F. Supp. 432). The district court herein declared, "If this Court were sitting as a trier of the facts in the present case, it would make the same findings of fact on the present record as it made upon the record in" *Ramsey* (A. 50a), and "Although if this Court were itself weighing the evidence, it would conclude, as . . . in" *Ramsey*, "that 'reviewing the evidence as a whole . . . the Court is unable to find that the evidence clearly reflects . . . plaintiffs were the victims of any conspiracy between the U.M.W. and any coal operators or other non-labor organization to eliminate or suppress competition in the coal industry or to eliminate or suppress the production and sale of coal by the plaintiffs' " (A. 51a).

Ignoring the denials and its *Ramsey* findings, the district court warranted the jury verdict herein upon the premise that the "test is whether substantial evidence exists in the record to support the verdict", citing *Fox West Coast Theatres Corp. v. Paradise Theatre*, 9 Cir., 264 F.2d 602, 605 (1958)—a case involving a *conflict* in the evidence (A. 50-51a), although the district court further declared, "In so holding the Court does not indicate its approval of that verdict in the sense that the Court concurs in the verdict, but only in the sense that the Court believes there was substantial evidence . . . on which the verdict could have been based" (A. 58a).

Ignoring the district court's expressed doubts concerning the verdict, the Sixth Circuit agreed with the district court's characterization of the evidence as conflicting and its test standard (A. 6a). *Neither the Sixth Circuit nor the district court specified any conflict in the evidence to warrant the lower court's characterization thereof. This is due to the fact there is no existing conflict* herein. Both ignored *first Pennington's* re-

quirement of "clear proof" and the Sixth Circuit's prior holding that the proper standard of proof in a *Sherman* suit against a labor union is *Norris-LaGuardia's* "clear proof" standard which, under *UMW v. Gibbs*, 383 U.S. 715 (1966), means *clear, unequivocal and convincing proof. Lewis v. Pennington*, 400 F. 2d 814; *Ramsey*, 72 LRRM 2325.

As noted (*ante*, p. 6), the jury exonerated UMW of the conspiracy charges in the 1950-58 period, finding [Issue No. (2)], *"prior to and apart from" the 1958 Agreement, UMW "did not conspire, combine or contract with" signatory operators to contract with "non-signatory operators only upon" the National Agreement's terms.* In so finding, it upheld UMW contentions of no conspiracy in the 1950 Agreement's execution, that BCOA's formation was unrelated thereto and did not result from UMW-operator agreement, that the collective bargaining pattern after 1950 did not change except to avoid "fish-bowl" publicity, and that increased labor costs in the post-1950 period were not related to conspiracy but resulted from arms-length bargaining.[6]

Both the district court and the Sixth Circuit found the jury's general issue verdict and Issue No. 3 verdict supported by "substantial evidence". These are discussed *seriatim:*

1. ***Issue No. 3: The protective wage clause and predatory intent.***

Prior to the instant case, *Ramsey* (265 F. Supp. 412) held PWC valid under the rule that where a clause is

[6]Noteworthy is the district court's concession of similarity of facts in *Ramsey* and those in the case at bar, because the jury's finding accords with *Ramsey* (265 F. Supp. 406-09). It is also consistent with *Lewis v. Pennington*, DC, E.D., Tenn., N.D., 1966, 257 F. Supp. 815, and the Sixth Circuit's affirmance thereof [400 F.2d 806 (1968)] and *Ramsey* (72 LRRM 2321).

capable of two reasonable constructions that construction should be adopted which does not result in violation of law, and "The only direct evidence in the record is to the effect that the Union pursued" its labor standards policy "upon its own, and not in agreement with any employer." Sanctioning PWC's interpretation, the Sixth Circuit's *second Pennington* held "the disputed Protective Wage Clause, properly construed, did not require the Union to impose the wages therein contained on the nonsignatory employers" and inclined to the conclusion that the record contained "insufficient evidence from which a conspiracy or other violation could be found to have been clearly shown" (400 F.2d 814). The Sixth Circuit's affirmance of *Ramsey* (72 LRRM 2321, 2323) affirmed the district court's *Ramsey*. This Court rejected certiorari in *second Pennington* (393 U.S. 983, reh. den. 393 U.S. 1045).

Ignoring undisputed denials that UMW entered into any agreement other than the National Wage Agreements, that PWC had its genesis in 1943 contract negotiations as a clause to protect UMW's contract and preserve miners' interest, that both *Ramsey* and *second Pennington* alike held PWC valid, and legal principles which occasioned *Ramsey* and *second Pennington* to hold PWC valid, *the district court differentiated those cases from the instant one on the ground that those cases had been judge-tried whereas the instant case had been jury-tried* and declared "Its meaning became an issue of fact for determination by the jury under appropriate instructions from the Court and extrinsic evidence as to the surrounding circumstances, including the practical construction given by the parties, may be received in aid of its interpretation" (A. 55-56a).

The Sixth Circuit, upholding the propriety of submitting PWC to the jury for interpretation, agreed that "Evidence of the surrounding circumstances and the practical construction of the parties is admissible to aid in its interpretation" and approved the district court's "finding of the jury is supported by substantial evidence" (A. 10a, 13a). *The Sixth Circuit, as did the district court, failed to explain why principles which caused it to approve PWC were inapplicable in a jury trial, as UMW pressed. Both disregarded UMW's complaint that the jury charge concerning "intent" collided with the Sixth Circuit's Ramsey and second Pennington, and of the evidence's insufficiency under appropriate standards of proof where a labor union is involved.*

2. *The general verdict finding: Increased labor costs and reduction of the market price of coal.*

In light of the jury's findings on the three Special Issues (94-95a), UMW contended the jury's General Verdict as to liability that UMW engaged in a conspiracy beyond its exemption was limited to the jury's Special Issue (3) finding as to PWC. Disagreeing, the district court declared that "in arriving at their general verdict the jury was charged with the duty of determining whether the defendant had committed an antitrust violation during" September 24, 1959 through 1963, the action's period of limitations, and Special Issues Nos. (2) and (3) would not necessarily be determinative of the General Verdict on the liability issue (A. 57a).

The district court pointed to plaintiffs' contention they were victims of a *Sherman* conspiracy seeking to accomplish its alleged unlawful purpose *"both by increasing its labor costs and by reducing the market price of coal"* and believed "There was evidence . . . sufficient

to create a jury issue with respect to each of these facets" (A. 60a) and that "there does exist substantial evidence . . . in support of the jury verdict on the issue of liability" (A. 58a). Failing to specify evidence it relied upon to support its conclusion, it avowed its approval of the General Verdict but did not indicate approval in the sense it concurred in the verdict, but only in the sense it believed "There was substantial evidence . . . on which the verdict could have been based" (A. 58a).

Ignoring the district court's expressed doubt of the jury's General Verdict, the Sixth Circuit held "The view adopted by the District Judge in his opinion is consistent with the jury's answers. We approve it" (A. 16a).

Recognizing that UMW and BCOA officers and agents denied agreement to impose the National Agreement on all operators, *but ignoring these denials were uncontradicted*, the Sixth Circuit declared the denials not conclusive on the jury but were to be considered with all other evidence (A. 12a).

C. The Issue of Whether Effects and Consequences May Be Substituted for Proof of a Conspiracy as a Predicate for a Jury Finding That a Labor Union Forfeited Its Labor Exemption From Conduct Proscribed by the Sherman Act.

Jury findings herein adverse to UMW were based upon district court jury charges that *"it is not necessary"* that UMW "have had a specific intent to establish a monopoly or *destroy competition"* and the *"required intent or purpose is present* if monopoly results as the *necessary consequence of what is done"* (1726a); that *"it is not essential that there should be a specific intent* to restrain commerce or create a monopoly" if the restraint or monopoly is the "necessary result of a combination, conspiracy or contract" (1728a); that "persons so combined or contracting will be presumed to have intended

the necessary and the natural consequences of their acts and agreements" (1728a), as well as other comparable statements (1728-30a). The district court's charge varies from plaintiffs' concession, though erroneous, made at the trial, that they relied on "conspiracy and combination" evidenced by "the national contract, that is inevitably a combination" (1757a) as the basis for UMW's forfeiture of its exemption (Second S.A. 10).[9]

It coincides, however, with the plaintiffs' Sixth Circuit position that "This case is not based solely on predatory conspiracy to drive operators such as TCCC out of business but also encompasses the claim that UMW made an agreement with BCOA (with particular reference to PWC) which was unreasonable, having the expected and inevitable *effect and consequence* of destroying many smaller companies and of creating concentration in the industry".[10]

Though *"effects and consequences"* as a substitute in lieu of proof of a conspiracy was rejected in *second Pennington* (400 F.2d 814) and by this Court's refusal of the certiorari petition therein (393 U.S. 983), which UMW pressed upon the Sixth Circuit as manifesting error in the district court's instructions, the Sixth Circuit approved the charge, holding "Other claimed errors in the court's instructions have been examined and in our judgment they do not merit discussion" and "We find no prejudicial error in the instructions" (A. 22a).

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[9]Pagination is to the Second Supplement to Joint Appendix filed by UMW.

[10]This statement is found in the brief of Tennessee Consolidated Coal Company and Grundy Mining Company filed in the Sixth Circuit in the instant case, p. 76.

D. The Issues Concerning Other Erroneous Jury Instructions

1. *Standard of proof.*[11]

The district court charged plaintiffs' duty was to prove their claim and various elements thereof by a *preponderance of the evidence,* defining *"preponderance"*, except that "Section 6 of the Norris-LaGuardia Act requires that the liability of labor organizations for the acts of officers, members, agents or others" had to "appear by clear proof" (1702-04). Returning to the "preponderance" rule, the district court charged that UMW "has monopolized, within the meaning of the antitrust laws, *if it appears from a preponderance of the evidence* . . . that first they knowingly combined or conspired either to obtain or to maintain the power either to remove or to exclude, or to keep out competitors from the field of competition" (1725a).

Both plaintiffs and UMW excepted to the instructions on standard of proof, causing the district court to undertake to clarify and correct its charge (1760-61a). The Sixth Circuit's opinion contains the district court's efforts (A. 17-21a) which concluded with the following:

> "Now, to the extent that the Court may have instructed you otherwise, during any portion of the case or with reference to any specific issue in the case *with respect to the purpose required or imposed upon the defendant, you will disregard that previous instruction and apply the instruction that I have now given to you, and as I have charged you originally with respect to the burden of proof"* (A. 21a),

prompting UMW's argument that the phrase, *"as I have charged you originally,"* is an obvious reference to the *preponderance rule* given in the initial discussion on

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[11]Charges pertaining to the standard of proof required are found at pp. 1702-03a, 1719-23a, 1725a, 1760-61a.

the standard of proof, and that the district court's charge was erroneous, confusing and prejudicial; but the Sixth Circuit, agreeing with the district court (A. 62-63a), declared "they stated the respective contentions of the parties fairly, defined the issues properly, and applied the law favorably to UMW" (A. 17a).

To be noted, however, is that the district court rejected (Second S.A. 11-12) plaintiffs' contention that it should have confined the "clear proof" rule to *agency* questions, while UMW contended the preponderance rule was not applicable to liability issues (1749a). The Sixth Circuit avowed, "Section 6 does provide that participation, authorization or ratification must be shown by clear proof" *but that "Section 6 does not state that the unlawful acts must be shown by clear proof"* (A. 17a).

2. *Submission of PWC's meaning to the jury.*

In contrast to the Sixth Circuit's *second Pennington* recognition that the district court "properly construed" PWC by applying the legal principle that, where a clause is capable of two reasonable constructions, "the construction should be adopted that does not result in a violation of law" and that PWC "properly construed" did not require UMW to bargain with non-signatories only on the basis of the National Contract (400 F.2d 814), and over UMW complaint (1751a; Second S.A. 1-8) that PWC's validity was a legal question for the trial court, and particularly so in light of uncontradicted denials of any conspiracy, the district court charged that in determining the *"intent of the parties"* the jury could look to PWC's language, all contractual language "relevant to that clause" and to all conduct of the parties with respect thereto, considering words used in their ordinary and usual meanings, the grammatical structure of the clause in accordance with usual rules of grammar

and sentence construction, and any other evidence admitted "to the extent" it might be relevant or "you may consider . . . worthy of consideration" (1735-36a, 1779a).

The district court's *rejection* of TCC's contention that PWC was a *per se* violation of *Sherman* (Second S.A. 12) emphasizes its error. Without explicating why *second Pennington's* rule of construction is applicable in a judge-tried case but inapplicable in a jury trial and why there was invalidity in UMW's contention that it was incumbent for the court to charge the jury that PWC was lawful, the Sixth Circuit disposed of UMW's contentions, *stating it to be one of the errors which "in our judgment . . . do not merit discussion"* (A. 22a).

3. The charge on specific intent.

In direct conflict with *second Pennington's* holding that " 'predatory intent' " is essential to prove an anti-competitive conspiracy (400 F.2d 814), the district court, over UMW exceptions (1750-51a), charged it was *not necessary* for UMW to have a "specific intent to establish a monopoly or *destroy competition*" (1726-28a). *The Sixth Circuit included this error as one which did not merit discussion* (A. 22a).

The Sixth Circuit also found "no prejudicial error in the instructions" above discussed (A. 22a).

E. The Issue of Whether UMW's Claim That the District Court Misinterpreted the Jury's General Verdict, and the Sixth Circuit's Answer Thereto.

In light of jury answers to the three Special Issues, discussed *ante*, pp. 9-12, UMW contended the jury's General Verdict as to liability that UMW engaged in a conspiracy, as plaintiffs alleged, beyond the exemption granted by antitrust laws to a labor union was limited to its Special Issue (3), namely, that UMW

and signatories to the 1958 Agreement "intended" by PWC's terms that UMW agreed to "contract with non-signatory operators only upon" the National Agreement's terms.

The Sixth Circuit agreed with the district court's rejection that it had misinterpreted the General Verdict, asserting that "If . . . UMW thought the special findings were inconsistent, unclear or ambiguous", objections should have been raised "at that time" (A. 16a). The Sixth Circuit *overlooked* that no inconsistency appeared on the face of the jury's findings. On their face, they were wholly consonant. Inconsistency appeared for the first time when the district court rejected its misinterpretation as a new trial ground (A.16a), thus rendering inapplicable Rule 49(b), Federal Rules of Civil Procedure, and demonstrating the Sixth Circuit's inaccuracy in holding UMW "waived any objection to the general verdict on grounds of inconsistency with a special finding" (A. 15a).

The Sixth Circuit's suggestion that UMW had ample opportunity to submit its own interrogatories on the predatory conspiracy issue when the court submitted its interrogatories (A. 16a) and that UMW "cannot now be heard to claim that the issue was not included in the general verdict" ignores the district court's instructions on intent (*ante*, pp. 12-13) and UMW's objection thereto. In light thereof, it would have been a useless gesture for UMW to have submitted an interrogatory as to anti-competitive intent.

F. The Issue of Damages

The district court, rejecting the jury's verdict of $977,500.00 for TCC because it had ignored losses attributable to other causes, suggested a remittitur of $500,000.00,

which TCC accepted (A. 73-74a, 83a), but did not disturb Grundy's award of $22,500.00. In addition to contending TCC had no standing to maintain the instant action (*ante*, p. 6), UMW noted in the Sixth Circuit that 1962 strike activity did not result from failure in bargaining between UMW and Grundy, but because of Grundy's refusal to recognize UMW as bargaining agent until certified as such for Grundy's employees, and Grundy's refusal to meet with UMW even after such certification. Plaintiffs' damage awards are predicated on the theory they would have earned the amounts claimed had they been privileged to pay in wages and benefits *what they were prepared, unilaterally, to establish, but which neither UMW nor its members were willing to accept.*

Contrary to the damages awarded, *Hunt* v. *Crumboch*, 325 U.S. 821, 825, holds that "without infringing the Anti-trust laws", laborers can "sell or not sell their labor as they please, and upon such terms and conditions as they choose".

The Sixth Circuit saw "no basis for reducing the verdict . . ." (A. 22a).

G. The Issue of UMW's Motion to Strike the Jury Panel.

Upon evidence taken (1784-1832a; Supp. App. 5-19), the trial court rejected (76-92a, 124a) UMW's motion to strike the jury panel (75a) because, *inter alia*, the manner in which the jury list was compiled neither met requirements of Title 28 USCA, Section 1864 but conflicted therewith, nor constituted an impartial jury drawn from the community's cross-section, nor accorded UMW "the right to be tried by a jury" as guaranteed by the Federal Constitution's Seventh Amendment (75a).

The 1960 U. S. Census showed that in counties comprising the judicial district involved herein, wage earners constituted 66% of total work population if clerical employees and working foremen are excluded, and 80% if included. Managerial employees represented but 7.8% of working population and farmers 2.4%. The remaining 9.8% consisted of professional, technical and kindred workers.

By the district court's own analysis, of the 120-member jury panel, at most 21% were wage earners (83a). When the April, 1967 term petit jury panel was drawn, 20.4% were non-supervisory wage earners and 79.6% were self-employed businessmen, professional men, farmers, managerial employees, executives, or their wives (86-92a).

Jury commissioners used the "key men" system to suggest names of potential jurors, who were either businessmen, professional men, farmers, managerial employees, or their wives (1795-1803a), or names obtained from personnel directors of local companies and Republican Executive Committee members (1812a). One commissioner used his own criterial (1818a). *Not a single wage earner or labor union official was a "key man"* (1784-1832a).

The district court overruled UMW's motion, first, because the evidence failed to show a cognizable element of the eligible citizenry had been deliberately or intentionally excluded from the panel; and second, because "the panel was drawn from the jury box . . when a reasonable and fair cross-section of the community was represented among the names within the box" (80a). UMW submits it is not enough to say "that a statistical correspondence between the composition of any particular jury panel and the total population is not required"

(A. 108a) because the commissioners' system consistently resulted in venires with a disproportionately small number of wage earners and a disproportionately large number of managerial types.

The Sixth Circuit, *noting the district court's finding that commissioners could improve their practice by enlarging the sector of suggestors and by selecting jurors at random from poll lists,* declared, "the abuses" did not rise to the level of discrimination against any group, upheld the "key man" system, and held district court findings to be "supported by substantial evidence" and "not clearly erroneous" (A. 24a). The Sixth Circuit rejected UMW's contention that the district court's holding the panel could not be stricken *unless* a particular group had been *intentionally excluded* conflicts with *Rabinowitz* v. *U. S.*, 5 Cir., 366 F.2d 34 (1966). Its holding that *Rabinowitz* found a particular definable group had been excluded (A. 24a) contrasts with *Rabinowitz's* statement that negro percentage was 5.8% *on the jury list* when the negro population was 34.5% of adult population and did not serve to validate the commissioners' actions (366 F.2d 39), and "The focus of the law is on the list from which the jury is drawn and not on the composition of a particular jury" (366 F.2d 59).

It conflicts, too, with this Court's *Thiel* v. *Southern Pacific Co.*, 328 U.S. 217, 220, that the fact that 5 jurors of the 12 which tried the case "belong more closely with the workingman and employee class than . . with any other class" did not save the case from this Court's condemnation. As *Thiel* recites (p. 220), *"Recognition must be given to the fact that those eligible for jury service are to be found in every stratum of society".*

THE FACTS

A. There Are Undisputed, Positive Denials That UMW Entered Into Any Agreement Other Than the Collective Bargaining Agreement.

No witness and no documentary evidence showed UMW entered into any conspiracy. Undisputed are denials of UMW's John L. Lewis, John Owens, W. A. Boyle and Welly K. Hopkins of any agreement to set wages or other employment standards at levels designed to eliminate any coal operators from the industry (919a, 948a, 1577a, 1647-48a, 1031-32a), or that UMW ever agreed to impose the National Agreement upon employers other than those bargaining at a particular time (1053a), or that UMW agreed with any operator whereby it was prevented from negotiating or executing a contract on terms differing from the National Agreement (1648a). Contrariwise, plaintiffs' vice-president and secretary and an attorney (694-95a) corroborated UMW testimony that Tennessee operators were told, "All issues are negotiable" (695a, 1095-96a, 1123a). *Similarly undenied* is testimony of George H. Love, a chief negotiator of the 1950 Agreement, of entering into no agreement with any UMW representative with respect to eliminating any coal operator, or that coal prices and markets would be controlled (1510a), or that there was a UMW-employer side agreement, in 1950 or thereafter, that "terms of the labor agreement reached" would be imposed by UMW on other bargaining units (1510-11a).[12]

B. UMW's Historic Policy For National Uniformity of Labor Standards.

National uniformity in wage rates and labor standards in the coal industry has been UMW's consistent policy since its origin in 1890. Removal of differences in

[12]Other corroborative denials appear, *ante*, pp. 7-8, 10, and *post*, p. 26.

labor standards as an element of competition in the coal industry has been the core of UMW's policy throughout its existence. UMW Conventions through the years mirror authoritative expression to its policy (982-1001a, 1613-16a). UMW's experiences show that wage-cutting to reduce costs and prices by one operator induces a cycle of wage-cutting by other operators which results in progressively depressing wages until it reaches the lowest level that is payable (988a, 989a, 1617-18a).

In 1941, the National Mediation Board, taking note of UMW's historic policy, observed that day-wage uniformity had been disrupted by the industry's chaotic condition between 1924 and 1933, and recommended an elimination of the 40 cents North-South differential, concluding that increased labor cost entailed in eliminating a differential is not sufficient to justify the Board's recommendation that the differential be maintained to preserve existing fair competitive opportunities (317-28a).

From 1941 to the present there has been almost complete uniformity of wage rates for day-men and a flat across-the-board wage increase given to the piece-worker has been equal in amount to the increase given the day-worker. Though pre-1941 differentials still exist, otherwise UMW has accomplished its historic policy of wage uniformity.[13]

As noted, *ante*, p. 7, the district court noted the similarity of facts herein to those in *Ramsey* and adopted *Ramsey's* summarization of facts. Facts pertaining to pre-1950 collective bargaining, the 1950 National Agreement's negotiation and execution, the post-1950-collective bargaining antedating the 1958 Agreement, narrated in *Ramsey* (265 F. Supp. 403-10), were held by *Ramsey*

[13]See *Ramsey*, 265 F.Supp. 404-05.

as not inferring any *Sherman* conspiracy (p. 410). The jury likewise found no conspiracy as to these matters (*ante*, p. 9), thus obviating, UMW believes, the necessity of detailing such facts.

C. The 1958 Agreement's PWC.

The 1958 Agreement's PWC is found in Appendix D hereto (p. 99-104a). It had its genesis in 1943 contract negotiations when UMW sought, and the National War Labor Board directed, each agreement contain a clause to protect the contract and preserve miners' interests, reading, "operators agree that they will not let any operating mines subject to this agreement as a subterfuge" (1038a). Every contract from 1943 through 1951 carried the anti-lease clause (1040a). It was amended in 1952 to read:

> "operators signatory hereto agree that this agreement covers the operation of all of the coal lands owned or held under lease by them, or any of them, or by any subsidiary or affiliate at the date of this agreement, or acquired during its term which may hereafter (during the term of this agreement) be put into production. The said *operators agree that they will not lease out any coal lands as a subterfuge for the purpose of avoiding the application of this agreement*" (1040-41a),

which language was carried forward in the 1955, 1956 and 1958 Agreements (1041a). UMW believed signatory operators were "chiseling" on the contract (1041a); and in negotiations for the 1958 Agreement, UMW achieved the Protective Wage Clause (PWC), requiring coal mined, produced, prepared, or acquired by signatory operators be mined under labor standards as favorable to employees as those in UMW's contracts (410a).

Construing PWC's Paragraph A., *Ramsey held* (265 F. Supp. 412) that PWC "does not constitute an express commitment" by UMW to BCOA "not to bargain with any other coal operator upon" terms other than the National Contract, and that "The only direct evidence . . . is to the effect that" UMW pursued its policy of uniformity of wage and labor standards "upon its own" policy "and not in agreement with any employer".

Ramsey (265 F. Supp. 410) describes PWC's Paragraph B as having to do with operators' obligation "in regard to subcontracting and leasing" and that subsequent paragraphs "have to do with the functioning of a joint industry contract committee in disposing of reported cases in violation of" PWC.[14] Herein the district court noted that *Ramsey* lacked the JICC minutes. These are *undisputed* and show the following:

At the January 21, 1959 meeting, Union members were Lewis, Kennedy and John Owens; operator members were Hamilton K. Beebe, Edward G. Fox and Joseph E. Moody, representing BCOA and the following associations: Southern Coal Producers, Illinois Coal Operators, Indiana Coal Operators, Indiana Coal Producers and Western Kentucky Coal Producers (415a, 417a).

Subsequent JICC meetings adopted operator compliance forms requiring certification of operator compliance with PWC's provisions that each employee covered "is receiving" full wages and that each operator was paying in full the 40¢ royalty to the United Mine Workers of America Welfare and Retirement Fund (419-20a). UMW district presidents were to certify a list of signatory operators and mines engaged in bituminous coal produc-

[14]PWC's current status of validity is shown in *Lewis v. NLRB*, D.C. Cir., 350 F.2d 801 (1965), and the recent NLRB decision, *Boyle, et al.*, NLRB Case No. 5-CE-6, 179 NLRB No. 80, 72 LRRM 1426 (Nov. 4, 1969), with Board Chairman McCulloch dissenting.

tion, and signatory operators could be informed if a specified operator or mine was listed, but complete lists were unavailable to any operator (420a).

Procedures for processing alleged PWC violations were adopted (421-22a); and failure to file compliance with PWC's terms constituted "a prima facie violation of" PWC. *All complaints from JICC's executive director related to operator-failure to file the required certification* (420-24a, 467a, 468a, 471a).

At the November 4, 1959 meeting, JICC discussed its status "with reference to the recently enacted Landrum-Griffin Bill"; and because of uncertainties and other factors derivative therefrom, JICC suspended further proceedings and PWC's administration and enforcement pending appropriate clarification and interpretation of the sundry problems until May, 1960 (472-73a). The March 31, 1964 meeting recorded PWC's deletion from the National Agreement effective April 2, 1964 (478-79a).

Notably, as shown (*post*, p. 35), PWC's validity as a labor standards clause to preserve UMW members' work opportunities and standards has been upheld.

D. UMW Investments in West Kentucky Coal Company; The TVA Coal Market and Coal Pricing Thereon by West Kentucky and Other Alleged Conspirators.

Ramsey (265 F. Supp. 412-23) details the voluminous evidence relating to the several subjects indicated above. TCC and Grundy made no challenge of the accuracy of *Ramsey's* factual recitals.

The district court's claim herein (A. 60a) the jury verdict was supported by evidence of a conspiracy to increase labor costs must be evaluated in light of *undisputed* evidence that the sole wage increase, provided in

the 1958 Agreement, amounted to $2.00 per day in two steps (1941-42a), which was consistent with increases in other industries, with prior increases in bituminous coal since World War II, and with UMW's across-the-board policy, achieved in 1941 and followed since then.

While UMW made investments and loans with respect to West Kentucky, they were made prior to 1958, and in the period in which the jury found UMW had not conspired in violation of *Sherman; it is uncontradicted UMW played no part in West Kentucky's management or pricing policies.*[15] *Indeed, plaintiffs' counsel stated, "We don't say that UMW controlled the marketing policy of West Kentucky . . ."* (1650a).

In dealing with the TVA coal market, *Ramsey* noted TVA pays about 20 cents to 22 cents per ton less than other public utilities on the average (265 F. Supp. 416). Upon non-conflicting evidence, *Ramsey* declared, "West Kentucky followed, but did not lead, the market", West Kentucky's price "was a matter of legitimate business judgment, with a view to making a profit on the coal while at the same time meeting competition in the market" (265 F.Supp. 419, 421), and "the evidence *fails* to establish that West Kentucky . . . or its subsidiary Nashville Coal . . . engaged in predatory pricing of coal upon the T.V.A. market" (265 F.Supp. 422).[16]

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[15]Numerous witnesses so testified (938a, 1031-32a, 1335a, 1661a, 1670a, 1671-72a). The district court's *second Pennington* declared, "Ten witnesses each of whom was in a position to know, testified positively that there was no predatory price fixing" (257 F.Supp. 863, aff'd. 6 Cir., 400 F.2d 806).

[16]Of the other various conspirators alleged, *Ramsey* found, on *undisputed* evidence that "Other than Peabody . . . these coal producers are not believed by the Court to have had sufficient impact upon the T.V.A. coal market to deserve further attention" (265 F.Supp. 417), and that as to Peabody, the Court declared "the evidence does not sustain the conclusion that the relationship between Peabody and West Kentucky was anything other than a competitive relationship . . ." (265 F.Supp. 418).

E. Events In Southeastern Tennessee Coal Field.

Ramsey (265 F.Supp. 423-430) details the evidence concerning plaintiff's contention they were *Sherman* victims upon UMW's part directed specifically at the Southeastern Tennessee coal field.

TCC operated at a profit throughout most of the 1950's (1956a). To the complaint that mechanization in Southeastern Tennessee's Sewanee seam must await refinement of equipment, *Ramsey responded,* "Neither the nature of the competition, the coal seam characteristics, the comparative adaptability to mechanization, nor other factors enhancing the problems of marginal coal producers can compel wage differentials nor form a basis for a court altering the legislatively permissible labor union policy of national wage uniformity" (265 F. Supp. 408). TCC's mines were progressively modernized to achieve productivity (248a, 257a). Though through 1960 TCC kept pace with the national productivity of 12.83 tons per man for deep mines (169a, 1975a), in 1957 TVA sought to encourage increased productivity to 17½ tons per man day, and awarded TCC a contract (248a). Absenteeism caused TCC to complain to UMW's District 19, which undertook corrective action, with success (250-51a, 1229a). TVA cancelled TCC's contract in June, 1959, because TCC's plans were "indefinite", "inadequate", and "offered no alternative for achieving increased . . . productivity" (249-50a). TCC gave UMW notice of cancellation of its National Agreement, and TCC's operations ceased March 15, 1960 (206a), and thereafter sought wages geared to productivity (206-13a), which District 19 representatives and employees refused (210a, 212a, 1148-50a, 1238a). TCC sought unsuccessfully to operate on a non-union basis through Grundy (214-15a); requested the men to return as

Grundy employees at 75¢ an hour below their former rate (215-19a, 255-56a, 1900-04a); the men refused (219a). TCC then assumed the role of a non-operating company, and has not since employed mining employees (233a, 241a, 264a).

Arrangements made by TCC with experienced engineers (Allen and Garcia) in 1961 resulted in execution of a UMW contract and a supplementary one with District 19 concerning seniority rights of former employees (213a, 219-20a, 644a). Numerous disputes between management and the men relating to employees' competency, seniority, alleged fueding between "two factions" within the local union, and trouble caused by discharge of an officer of the company, occurred during the operation, which closed June 6, 1962, by reason of a "tremendous rock fall".[17]

Allen and Garcia started a new mine for TCC (Gray's Creek No. 11) in July, 1962 (221a). Seniority problems continued;[18] UMW proposed that grievances be submitted to arbitration; Allen and Garcia refused (683a, 1161-62a, 1170a); Allen and Garcia terminated their agreement with TCC on August 21, 1962 and gave a 60-day notice of termination of UMW's contract (221a, 675a, 672-73a).

Ramsey declared "there is no direct evidence" the foregoing "was a part of any Sherman Act conspiracy" upon UMW's part (265 F. Supp. 427).

Upon Allen and Garcia's withdrawal, TCC operated its Gray's Creek mine through Grundy under UMW's contract during the 60-day terminal period and without a contract thereafter until the December 26, 1962 work stoppage, discussed below. In August, 1962, UMW's Dis-

[17] 680a, 746-50a, 757a, 655a, 679-80a, 674a, 1151-59a, 1161-63a, 1201-05a, 681a, 653a, 267-68a, 221a, 664a, 682a.

[18] 221a, 664-65a, 650a, 666-67a, 1080-83a.

trict 19 gave termination notices of its National Agreement to truck mine operators, including those on TCC leases, because of failure to pay royalties due the UMWA Welfare and Retirement Fund and vacation pay due under the contract.

The Sewanee negotiations

Sewanee Coal Operators Association ("Sewanee") was formed in 1962 to negotiate with UMW (1093-95a). Area truck mines, whose UMW contracts had expired, were members. TCC and Grundy were "qualified members" (709a). Four meetings were held between District 19 and Sewanee under auspices of the Federal Mediation and Conciliation Service (1095-1100a). Sewanee had no authority to negotiate for TCC or Grundy (694a, 708-09a).

Sewanee, claiming its seam's irregularity and inadaptability to mechanization made it impossible to operate under the National Agreement, sought a sliding scale based upon varying degrees of mechanization and reduced Welfare Fund royalties, below UMW's established rates (1099a, 1109-10a). UMW District 19's request to examine company books to substantiate the plea was rejected (1096-97a), as was Sewanee's wage proposal, District 19's president explaining miners had not had an increase in approximately three years.

The work stoppage of December 26, 1962

On December 26, 1962, Grundy employees ceased work when Grundy refused to check off union dues (223a, 1100a, 1164a, 1212-13a). District 19 charged TCC with inciting the strike, with failure to maintain the same employment conditions, and with refusing to process grievances and deduct dues (1101-04a). TCC's president rejected District 19 efforts to meet to reach a settlement (1111-14a).

Spreading to the truck mines, the strike continued throughout the damage period (223-27a). In May, 1963, Grundy reopened its mine without a union contract, paying wage rates "close to" those of UMW's contract, except for the Welfare royalty, if employees earned full incentive pay. It has operated in such manner since that time (224a, 894-96a).

NLRB's certification of UMW as representative of the employees, and Grundy's disregard of UMW's request to bargain

In 1963, UMW obtained NLRB certification as representative of employees in a unit comprised of Sewanee members, including Grundy and TCC (1087a, 1104a), employees voting 480 for UMW and 96 for Southern Labor Union. Grundy thereafter ignored UMW proposal to work out a tentative agreement whereby men could return to work (289a, 711a, 1105a). In June, 1965, NLRB certified UMW as bargaining representative (1104a). UMW requested unit employers to bargain, but TCC and Grundy (as well as the others) again ignored the request (289-90a, 713a, 1105a).

Of evidence pertaining to the Southeastern Tennessee coal field, *Ramsey* declared, "Clear proof does not appear, either directly or by inference, that the U.M.W. acted other than unilaterally in furtherance of its own interests and purposes in its activities in the Southeastern Tennessee coal field . . ." (265 F.Supp. 430); "the evidence does not demonstrate" UMW "acted in conspiracy with employers elsewhere in its dealings with the plaintiffs and others in the Southeastern Tennessee coal field" (265 F.Supp. 431); and "Under such circumstances the U.M.W. could not be required, as a means of escaping antitrust liability, to bargain for labor standards, wages

or working conditions that would improve the plaintiffs' competitive position by the reduction of wages or labor standards, by gearing wages to the status of mechanization or its lack, or by tying wages to productivity" (265 F.Supp. 431).

REASONS FOR GRANTING THE WRIT

A. THE SIXTH CIRCUIT'S APPROVAL OF THE JURY VERDICT REPRESENTS AN INCORRECT IMPLEMENTATION OF PRIOR IMPORTANT DECISIONS OF THIS COURT PERTAINING TO A LABOR UNION'S IMMUNITY FROM CONDUCT PROSCRIBED BY THE SHERMAN ANTITRUST ACT AND NULLIFIES A UNION'S RIGHT TO ENTER INTO AN INDUSTRY-WIDE, MULTI-EMPLOYER COLLECTIVE BARGAINING AGREEMENT.

Despite repetitive Congressional refusals to prohibit industry-wide bargaining,[19] the Sixth Circuit has yielded to plaintiffs' contention that UMW should have abandoned its historic policy of uniformity of labor standards, acceded to plaintiffs' demand that they be subsidized at the expense of UMW's coal miner members and afforded a wage advantage over their competitors derivative from regional collective bargaining, and that effects and consequences of a lawful industry-wide collective bargaining agreement sufficed to prove a *Sherman* conspiracy.

The Sixth Circuit's holding collides not only with Congressional will and national labor policy, but it is incongruous with *first Pennington's* holding which accorded UMW the right to adopt a uniform wage policy and, as a matter of its own policy, to seek the same wages from other employers (381 U.S. 664). It violates this Court's recognition since *Apex Hosiery Co. v. Leader,* 310 U.S. 469, that under *Clayton's* Section 6

[19]See the dissenting and concurring opinions of Justices Goldberg-Harlan-Stewart to *first Pennington* in *Meat Cutters Union* v. *Jewel Tea Co.,* 381 U.S. 676, 697, 712-13 and fn. 20, citing *NLRB* v. *Truck Drivers Union, No. 449,* 353 U.S. 87.

restraints on sale of employee services are not conspiracies outlawed by *Sherman*. It nullifies and renders meaningless the immunity granted labor unions under that Section, and renders the right of collective bargaining illusory and "the road to prison", condemned in *U. S. v. Hutcheson*, 312 U.S. 219, 234-35.

Indeed, since *Allen Bradley Co. v. Local Union No. 3*, 325 U.S. 797, declared that *Sherman's* policy was "to preserve a competitive business economy" with "the rights of labor to organize to better its conditions through the agency of collective bargaining" (p. 806), the Sixth Circuit's holding herein would be antithetical to *Sherman's* policy.

Ignoring the district court's expressed doubt concerning the propriety of jury findings (*ante*, p. 8), the Sixth Circuit achieves its result of tainting as illegal a lawfully-obtained collective bargaining agreement and legally-accomplished union objectives of higher standards of wages and working conditions permissible under national labor law by adopting the district court's evaluation of the evidence as "conflicting" when in fact *it is undisputed*, and by employing erroneous trial techniques at variance with prior well-established judicial trial principles.

The Sixth Circuit's affirmance of jury findings invites Justices Goldberg-Harlan-Stewart's admonition in *first Pennington's* concurrence against "judges and juries from roaming at large in the area of collective bargaining, under cover of the antitrust laws, by inquiry into the purpose and motive of the employer and union bargaining on mandatory subjects" (381 U.S. 716) and inveighs against jurors becoming "arbiters of the economic desirability of the wage scale in the Nation's coal industry", asserting "neither have the aptitude nor possess the

criteria for making this kind of judgment" and avowing disbelief that "Congress has sanctioned judicial wage control under the umbrella of the Sherman Act" (pp. 718-19).

If upheld, the Sixth Circuit's affirmance of the jury verdict will herald the destruction of industry-wide, multi-employer collective bargaining. The Sixth Circuit's preference accorded regional bargaining stands in contrast to plaintiffs' unwillingness to join other coal producers in negotiating a multi-employer agreement which has produced uniformity of labor standards, including an industry-wide welfare and retirement fund, for approximately 80% of employees engaged in bituminous coal mining. The Sixth Circuit's pattern for regional collective bargaining stands in deep opposition to this Court's recognition in *NLRB v. Truck Drivers Union, No. 449*, 353 U.S. 87, 95, that "Approximately four million employees are now governed by collective bargaining agreements signed by unions with thousands of employer associations" and its recognition that multi-employer bargaining is "a vital factor in the effectuation of the national policy of promoting labor peace through strengthened collective bargaining". It stands in variance to this Court's avowal in *Local 24, Teamsters v. Oliver*, 358 U.S. 283 (1959) that "Within the area in which collective bargaining was required, Congress was not concerned with the substantive terms upon which the parties agreed", that *Taft-Hartley's* purposes "are served by bringing the parties together and establishing conditions under which they are to work out their agreement themselves" and "To allow the application of the . . . antitrust law here would wholly defeat the full realization of the congressional purpose" and "frustrate the parties' solution of a problem which Con-

gress has required them to negotiate in good faith toward solving . . ." (358 U.S. 295-96).

1. The Sixth Circuit's Sanction of the Jury's Determination of PWC's Meaning and Validity Conflicts With Prior Decisions of This Court and With the Sixth Circuit's Second Pennington and Ramsey.

Consistently, from *Apex Hosiery Co. v. Leader*, 310 U.S. 469, 503, through *American Federation of Musicians v. Carroll*, 391 U.S. 99, 106, including *first Pennington* (381 U.S. 657), this Court has recognized that elimination of wage competition is not the kind of restraint Congress intended *Sherman* to proscribe; and because employers and unions are required to bargain about wages, hours and working conditions, this Court rejected condemning labor agreements as illegal *per se*, declaring it "will not assume that unions and employers will violate the federal law" and that the *illegality-per-se* doctrine applies only where the contract explicitly calls for illegal conduct. *NLRB v. News Syndicate Co.*, 365 U.S. 695, 699-700. A labor agreement "standing alone" would not violate *Sherman* (*Allen Bradley Co. v. Local 3, Electrical Workers*, 325 U.S. 797) and "An unlawful purpose is not lightly to be inferred" (*NLRB v. McGahey*, 5 Cir., 233 F.2d 406).

Concededly, PWC's language, its historic background, and the denials of union and management representatives alike that UMW entered into no agreement other than the National Agreement, herein and in *Ramsey* (*ante*, pp. 21, 23-24) are identical. Of the *sole* factual difference in the two cases, namely, the JICC minutes, the Sixth Circuit herein recites (A. 11a) that JICC "sent out forms to operators requiring them to certify that they had fully complied with the national agreement". Though nothing therein suggests a conflict of evidence or con-

notes an anti-competitive agreement, the Sixth Circuit adopted the district court's appraisal that "The evidence was *conflicting*" (A. 6a) and because thereof "the finding of the jury is supported by substantial evidence" (A. 13a).

However, there was no conflict: witnesses agreed, *without contradiction,* UMW agreed with no operator whereby UMW was prevented from negotiating or executing a contract on terms different from the National Agreement's terms, and asserting affirmatively there was no understanding UMW would impose the National Agreement upon employers other than those bargaining at the particular time (1648a, 1053a).

a. Previous Sixth Circuit Cases Have Held PWC Valid By Implementing a Rule of Construction Adopted By This Court.

The Sixth Circuit's *second Pennington* (400 F.2d 814) and *Ramsey* (72 LRRM 2323) held PWC valid by applying the principle that because PWC "is capable of two reasonable constructions . . . the construction should be adopted that does not result in a violation of law", citing this Court's *Great Northern Railway Co. v. Delmar Co.*, 283 U.S. 686 (1931) and the Seventh Circuit's *Perry Coal Co. v. NLRB*, 284 F.2d 910, 914 (1960). Both *second Pennington* (400 F.2d 814) and *Ramsey* (72 LRRM 2323) concluded that "properly construed" PWC did not require the union to impose the wages therein contained on the non-signatory employers.

b. The Sixth Circuit's Approval of the Jury Verdict Required it to Ignore Trial Principles Previously Sanctioned by it.

In both the Sixth Circuit and the district court, UMW contended *second Pennington* and *Ramsey* held PWC valid and it was error to submit for jury determination PWC's meaning and validity.

Ramsey's procedure in holding PWC valid was first to implement the noted rule of construction (265 F.Supp. 412) and then to inquire whether the evidence supported an implied, as distinguished from an express, commitment to BCOA that UMW would bargain with other operators only upon the National Agreement's terms and noted that "All of the direct evidence . . . expressly denies" the conspiracy and "Every officer of the Union who testified, as well as every representative from the coal industry alleged to be in on the conspiracy, denied its existence" (265 F.Supp. 432). In total variance from *Ramsey's* pattern and that in *second Pennington*, holding PWC valid, the Sixth Circuit herein ignored the lack of conflict, the undisputed evidence of PWC's background and, disregarding the vital rule of construction which proclaimed its validity in two other cases and without explaining its inapplicability, sanctioned the contract's terms by the jury, holding "Evidence of the surrounding circumstances and the practical construction of the parties is admissible to aid in its interpretation" (A. 10a).

Cases cited by the Sixth Circuit (A. 10a)[20] to support its holding are inapposite, since (1) none involved a labor agreement of labor's exemption from antitrust laws, and (2) none concerned the rule of construction which impelled the Sixth Circuit's validity holdings in *second Pennington* and *Ramsey*.[21]

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[20] *United States* v. *Continental Oil Co.*, 10 Cir., 364 F.2d 516 (1966); *Steele* v. *McCargo*, 8 Cir., 260 F.2d 753 (1958); *Hawkins* v. *Frick Reid Supply Corp.*, 5 Cir., 154 F.2d 88 (1946).

[21] The Sixth Circuit's characterization of PWC's Paragraph B as a "boycott", connoting some illegality thereto, is to be compared with the conflicting views in *Lewis* v. *NLRB*, D. C. Cir., 350 F.2d 801, and *Boyle, et al.*, 179 NLRB No. 80, 72 LRRM 1426, Nov. 4, 1969 (NLRB Chairman McCulloch dissenting), which sanctioned PWC's Paragraph B as a *labor standards clause*, permissive under Section 8(e), Labor Management Relations Act, 1947, as amended [29 USCA 158 (e)]. *NLRB's holding is crucial in light of first Pennington's recognition of national labor policy as reflected by NLRB decisions* (381 U.S. 666-68).

The Sixth Circuit's recital that "UMW struck operators who refused to agree to the national contract", obviously intended by the Sixth Circuit to indicate illegal conduct, is answered by *Hunt v. Crumboch,* 325 U.S. 821, 824, declaring that, "It is not a violation of the Sherman Act for laborers in combination to refuse to work" and "They can sell or not sell their labors as they please, and upon such terms and conditions as they choose, without infringing the Anti-trust laws". *Accord*: *Apex,* 310 U.S. 503.

Moreover, the Sixth Circuit took no cognizance that the district court, as to PWC, declared, "if this Court were now called upon to weigh the evidence as a trier of facts it would reach the same conclusion with respect" to PWC's meaning "as it reached" in *Ramsey* (A. 57a).

Since the Sixth Circuit's approval was based upon its agreement that the jury verdict as to PWC "is supported by substantial evidence" (*ante,* pp. 8-9, 12), UMW's discussion concerning the issue of "substantial evidence", discussed *post,* pp. 37-41, is equally apposite to PWC.

2. The Sixth Circuit's Approval of the Jury's Verdict on the Premise It Was Supported by "Substantial Evidence" Collides With and Ignores Guidelines of Prior Important Decisions of This Court and the Sixth and Tenth Circuits for Determining the Meaning of "Substantial Evidence".

In agreeing with the district court that the jury verdict as to liability had support of "substantial evidence", the Sixth Circuit ignored prior decisions of this Court and the Sixth Circuit for determining the meaning of that term.

As in *Ramsey,* the instant record contained no direct proof of conspiracy. No operator or other person supported the jury's finding of intent and agreement that

UMW would impose the National Agreement upon other bargaining units. As in *Ramsey,* plaintiffs relied upon circumstantial evidence, with the sole exception of proof relating to PWC and JICC, the validity of which has been demonstrated (*ante*, pp. 34-37). As in *Ramsey, without contradiction,* the direct evidence expressly denied plaintiffs' conspiracy contention, for every union and every management representative testifying denied a conspiracy's existence.

The Sixth's Circuit's view herein that such denials were "not conclusive on the jury, which had the right as well as the duty to consider their denials in the light of the other evidence in the case" (A. 12a), collides with this Court's approval in *C. & O. R. Co. v. Martin*, 283 U. S. 209, 219-20, of the rule that "It is not proper to submit *uncontradicted* testimony to a jury for the sole purpose of giving the jury an opportunity to nullify it by discrediting the witness, when nothing more than mere interest in the case exists upon which to discredit such witness . . .". In such circumstances, *Browning v. Crouse*, 10 Cir., 356 F.2d 178, declares that, "no question of credibility or issue of fact is presented for determination by a trier of fact."

Since TCC and Grundy had the burden of proving the alleged conspiracy, mere speculation "is not allowed to do duty for probative facts" nor "supply the place of proof". *Tennant v. Peoria & Pekin Union R. Co.*, 321 U.S. 29, 32; *Moore v. C. & O. Ry. Co.*, 340 U.S. 573, 578.

The district court's *Ramsey* (265 F. Supp. 432), affirmed by the Sixth Circuit (72 LRRM 2321), reviewed the evidence as a whole, which admittedly included all evidence herein other than the JICC minutes (which clearly lacked evidentiary support of a conspiracy), all

pre-1958 Agreement evidence as to which the jury herein has exonerated UMW of the conspiracy charge, as well as the events in the 1959-1963 period, rejected that *Ramsey* plaintiffs were victims of a UMW-operator conspiracy to eliminate or suppress competition or eliminate the sale of coal by those plaintiffs, and declared, "While many inferences favorable to the plaintiffs' contentions can reasonably be drawn from the evidence, in every instance a no less equally reasonable inference can be drawn to the contrary" and "The latter, when coupled with the positive denial by many witnesses of any conspiracy, as well as other inferences favorable only to" UMW, "do not permit a finding based upon clear proof of an anti-trust conspiracy" (265 F. Supp. 432).

Nor is the jury verdict supported by legitimately derived inferences so as to bring the jury's verdict within the "substantial evidence" meaning. Though verdicts premised upon circumstantial evidence in antitrust cases have been sustained, the circumstances proven must lead with *reasonable certainty* and be of such probative force as to create a basis for a legal inference, not mere suspicion. Where, as herein, UMW could forfeit its labor exemption only upon clear, unequivocal and convincing proof (*first Pennington; second Pennington; Ramsey*), *certainty must satisfy that standard of proof.*

The Sixth Circuit's conclusion of "substantial evidence" support conflicts with *Pennsylvania R. Co. v. Chamberlain*, 288 U.S. 333, 340-41, which precludes use of inferences to prove conspiracy where there is "*uncontradicted testimony of unimpeached witnesses* . . . that the fact sought to be inferred did not exist". *Chamberlain* approved (p. 340) the rule that, "*When the evidence tends equally to sustain either of two inconsistent propositions, neither of them can be said to have been estab-*

lished by legitimate proof", and *"A verdict in favor of the party bound to maintain one of those propositions against the other is necessarily wrong"*.

Herein, in affirming the jury verdict, the Sixth Circuit failed to implement the rule that where two equally reasonable inferences can be drawn from circumstances, innocent conduct must be inferred in the absence of evidence to the contrary. It has abandoned its adherence to the rule that any inference favorable to TCC and Grundy would offer the jury no more than *a choice of probabilities to conjecture or guess;* and "In this state of the record . . . the controversy calls for the application of the principle frequently applied by this and other courts, namely: *that to submit to a jury a choice of probabilities is but to permit them to conjecture or guess, and where the evidence presents no more than such choice, it is not substantial"*. *Gulf Refining Co. v. Mark C. Walker & Son Co.*, 6 Cir., 124 F. 2d 420, 425, 426; *Troutman v. Mutual Life Ins. Co. of N. Y.*, 6 Cir., 125 F. 2d 769, 772; *U. S. v. Saunders*, 6 Cir., 325 F. 2d 840, 843; *Dayton Veneer & L. Mills v. Cincinnati, etc., Ry. Co.*, 6 Cir., 132 F. 2d 222, 223.[22]

The Sixth Circuit's approval of the jury verdict is at variance with the rule expressed in Moore's Federal Practice, 2d Ed., Vol. 5, p. 2317, "where there is a complete absence of . . . proof on an issue or issues material to the cause of action", *a directed verdict is proper* and is "a method for protecting neutral principles of law from powerful forces outside the scope of law—com-

[22]Despite the Sixth Circuit's ruling in *Dayton*, the district court erroneously cited it in support of its view that the test of the evidence's sufficiency was whether there was support by "substantial evidence" (A. 50a).

passion and prejudice." (Cf. *Rutherford v. Illinois Central R.R.*, 5 Cir., 278 F.2d 310, 312, cert. den. 364 U.S. 922; also *Edwards v. U. S.*, 6 Cir., 140 F.2d 526):

3. The Sixth Circuit's Sanction Herein of Effects and Consequences as a Substitute for Predatory Conspiracy Proof Conflicts With This Court's First Pennington, With The Sixth Circuit's Holdings in Second Pennington and Ramsey and With This Court's Denial of Certiorari in Second Pennington.

A union's antitrust immunity under *Clayton's* Section 6 exists to prevent juries and courts alike from inferring a conspiracy on a union's part to restrain trade from sanctioned conduct. As in the instant case, lawful exercise of collective employee rights is converted into a conspiracy by imputing a purpose to obtain those effects on inefficient employers which are but the by-product of UMW's pursuit of its members' interests. If its conduct can be adjudged in light of effects and consequences of an industry-wide bargaining agreement, a union's immunity from *Sherman* is fanciful. So long as a union acts as agent of employees exercising collective rights guaranteed by *Taft-Hartley's* Section 7, it is not subject to liability under *Sherman*, whatever the foreseeable economic consequences of its conduct. *Hutcheson's* command that a *Sherman* violation be determined only by reading *Sherman, Clayton* and *Norris-LaGuardia* as "interlacing statutes" (312 U.S. 232), and that sanctioned conduct under *Clayton* could not serve as a predicate for a *Sherman* violation, are equally apposite to conduct which finds sanction under *Taft-Hartley's* Section 7, and renders unavailable the use of an inference of conspiracy from permissible activity.

Plaintiffs theorized that "parties intend to bring about the necessary effects and consequences of their agree-

ments and business dealings", and that "intent may be inferred" therefrom.[23] In accepting such thesis based upon unemployment resulting from intensive mechanization, the inability of operators in poor geological conditions to keep pace, the losses of coal producers in 1959 as compared with net profits of two of the largest coal producers (1527-28a, 1530a, 1975a) and stamping UMW's complaint on instructions pertaining thereto (*ante*, p. 14-15) as one *not meriting discussion* (A. 22a), the Sixth Circuit ignored its contrary holdings in *second Pennington* (400 F.2d 806, 814) and *Ramsey* (72 LRRM 2321, 2324-25) that *first Pennington* required a finding of "anti-competitive conspiracy".

Second Pennington's certiorari petition complained the Sixth Circuit had failed to consider "the drastic effects throughout the whole industry and areas devoted to coal mining of the practices complained" therein; they assigned as a reason for granting the writ that "Industry-wide bargaining is a potent factor in our economic order" and "has a natural tendency to favor" the industry's dominant units negotiating contracts over smaller and weaker units; but this Court rejected (393 U.S. 983) review of the question (Petition 4), "Was the District Court (sustained by the Court of Appeals) right in holding that *effects of industry-wide bargaining are alone insufficient and were both lower courts right in not considering anywhere in their findings and conclusions such effects . . .?*" Its rejection is vital since

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[23]Brief of Tennessee Consolidated Coal Company, et al., in the Sixth Circuit, pp. 35-36, 44, 76-77.

the question posed included *the identical indicia* now asserted by plaintiffs.[24]

a. The Sixth Circuit's Acceptance Herein of Effects and Consequences in Lieu of Conspiracy Conflicts With This Court's First Pennington.

Substitution of effects and consequences would totally ignore labor's exemption and *first Pennington's* requirement that a prerequisite to a forfeiture of that exemption is proof that a union "has *agreed* with one set of employers to impose a certain wage scale on other bargaining units". It would completely strip of meaning Justice White's avowals that unilaterally a union may adopt a uniform wage policy and seek vigorously to implement it, and the union need not gear its wage demands to wages which the weakest units in the industry can afford to pay. It would render meaningless Justice White's further unequivocal statement that, "Such union conduct is not alone sufficient evidence to maintain a union-employer conspiracy charge under" *Sherman*, and *"There must be additional direct or indirect evidence of the conspiracy"* (381 U.S. 665 and fn. 2).

The Sixth Circuit's *Ramsey* (per Circuit Judge Edwards) read *first Pennington* as requiring proof of an anti-competitive conspiracy and, though recognizing de-

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[24]In the certiorari petition in *second Pennington* (Case No. 558 in this Court), Question 5 read thus:

"Was the District Court (sustained by the Court of Appeals) right in holding that effects of industry-wide bargaining are alone insufficient, and were both lower courts right in not considering anywhere in their findings and conclusions such effects—the growing prosperity of the two largest companies and the deficit position of all the rest of the industry combined, the inevitable and accelerating merger and concentration trend, the blight created in broad areas where conditions make the contract impossible, the loss of jobs of two-thirds of union members from automation made necessary by national contracts with nothing in the contracts to relieve the unemployed, the intensive and often violent efforts of the union to destroy the businesses of non-conforming operators, the waste of vital natural resources in abandonment of all but those areas of mines which can be stripped off the easiest of worked underground with large machines".

nial of certiorari did not represent an affirmance of *second Pennington,* avowed it "inappropriate to discount completely the denial", and that had the district court or the Sixth Circuit in *second Pennington* interpreted *first Pennington* instructions erroneous, "we find it difficult to believe that the Supreme Court would have ignored the error" (72 LRRM 2325).[25]

Consonant with *second Pennington* and *Ramsey* holdings that proof of "predatory intent" is essential, is the Third Circuit's declaration in *Delaware Valley Marine Supply Co. v. American Tobacco Co.*, 297 F.2d 199, 202-03 (1961), that "conspiracy remains an essential ingredient of a" *Sherman* case.

The thrust of the Sixth Circuit's opinion does not impinge upon UMW alone. Under it, collective bargaining on a national scale stands threatened. Every industry-wide collective bargaining agreement, every labor union and every employer signatory to a multi-employer agreement is rendered a suspect for charges of violating *Sherman* by any disgruntled employer seeking to operate at wage levels lower than those achieved in industry-wide bargaining.

The Sixth Circuit's opinion invites chaos in the existing pattern of multi-employer national bargaining agreements attained only after a long, bitter and expensive experience and currently prevalent in all major industries in this country. If the Sixth Circuit's result is permitted to stand, the public interest will be thwarted because no national union could hereafter safely expose itself to criminal, injunctive and monetary penalties imposed upon it by the Sixth Circuit's pattern in discharging the

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[25]As noted, *Ramsey's* affirmance was by an equally divided court.

very duties and functions constituting the purpose of its existence.

Congressional will concerning industry-wide bargaining, judicially recognized, accentuates the need for review of the Sixth Circuit's judgment and opinion by issuance of the Writ sought herein.

B. THE SIXTH CIRCUIT'S HOLDING THAT SECTION 6 OF THE NORRIS-LaGUARDIA ACT DOES NOT REQUIRE THE UNLAWFUL ACT OF CONSPIRACY TO BE SHOWN BY CLEAR PROOF REPRESENTS AN INCORRECT INTERPRETATION AND APPLICATION OF A PRIOR IMPORTANT DECISION OF THIS COURT CONSTRUING THE NORRIS-LaGUARDIA ACT. IT CONFLICTS, TOO, WITH SIXTH CIRCUIT DECISIONS ENTERED BOTH PRIOR AND SUBSEQUENT TO THE INSTANT ACTION.

Though conceding Norris-LaGuardia's Section 6 provides that participation, authorization or ratification must be shown by clear proof, *the Sixth Circuit holds that "Section 6 does not state that the unlawful acts must be shown by clear proof"* (A. 17a). The Sixth Circuit's holding conflicts with this Court's *Carpenters v. U. S.*, 330 U.S. 395 and *Gibbs* (383 U.S. 736) which specifically pointed out that *Carpenters, an antitrust case,* declared Section 6's "purpose and effect was to relieve" labor unions "from liability for damages or imputation of guilt for lawless acts done . . by some individual officers or members of the organization, *without clear proof* that the *organization* . . . charged with responsibility for the offense actually participated, gave prior authorization, or ratified such acts after actual knowledge of their perpetration". Unions were to be insulated against liability except upon clear proof as enunciated in Section 6. Actual, not theoretical, culpability or complicity would provide a basis for union responsibility. Repetitive use of the word *"actual"* in Section 6 undeniably evinces Congressional intent that

union liability was to rest upon *actual* realities and not imputations.

In its most recent appraisal of the issue (September 26, 1969) which affirmed *second Pennington* (400 F.2d 814, decided September 11, 1968), the Sixth Circuit's affirming opinion in *Ramsey* believed Judge Peck[26] (and Judges Wilson and Taylor)[27] were right in holding that the 'clear proof' standard of the Norris-LaGuardia Act is the proper standard of proof applicable to a Sherman Act suit against a labor union", citing both *Carpenters* and *Gibbs* (72 LRRM 2325). The affirming opinion (per Circuit Judge Edwards) recites it is "impossible for a labor union to act except by dint of actions of its officers, members or agents"; that *"Even more specifically pertinent to the standard of proof applicable to this case is the fact that this action is a claim of violation of the Sherman Antitrust Act by an illegal conspiracy to drive plaintiffs out of business on" UMW's part;* and that "Such a conspiracy could obviously be carried out only by officers, members or agents of the union acting in an agency relationship" (72 LRRM 2325). As Circuit Judge Edwards states, "Any reconciliation of national labor policy with national antitrust policy demands application" of the clear proof standard (72 LRRM 2325).

C. THE SIXTH CIRCUIT'S SANCTION OF THE DISTRICT COURT'S JURY CHARGE AS TO SPECIFIC INTENT COLLIDES WITH THIS COURT'S FIRST PENNINGTON AND OTHER FEDERAL DECISIONS.

Antitrust laws are concerned with anti-competitive aspects and unreasonable restraints. Indeed, the Sixth Circuit's *second Pennington* (400 F.2d 814) read *first*

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[26]*Second Pennington's* opinion in the Sixth Circuit was issued through Circuit Judge Peck.

[27]District court judges who prepared the opinions in *Ramsey* and *second Pennington*, respectively.

Pennington as teaching that predatory intent "as used by Mr. Justice White" (381 U.S. 668) "is merely shorthand, employed to describe" an anti-competitive conspiracy. Herein, the Sixth Circuit swept aside UMW's contention that the district court erred in its jury charge as to "specific intent to . . . destroy competition" as one not meriting discussion (*ante*, p. 16). Its view stands in conflict with its subsequent *Ramsey* approval (72 LRRM 2324) of what the Sixth Circuit had held in *second Pennington*.

D. THE SIXTH CIRCUIT'S APPROVAL OF THE JURY VERDICT PRESENTS A SUBTLE DESTRUCTION OF LABOR'S IMMUNITY GRANTED BY CONGRESS AND RECOGNIZED BY THIS COURT.

The Sixth Circuit's rulings herein complained of are not only erroneous but threaten the effectiveness of labor's immunity from conduct interdicted by *Sherman*. Where, as herein, the Sixth Circuit has not concerned itself with the district court's doubt concerning the jury's findings adverse to UMW, and its rulings are erroneous and offensive not only to prior decisions of this Court but also to Sixth Circuit rulings both prior and subsequent to the instant rulings, it becomes obvious that adoption of the Sixth Circuit's erroneous pattern presents a subtle destruction of labor's exemption under *Clayton's* Section 6.

The Sixth Circuit's affirming opinion in *Ramsey* (72 LRRM 2325-26) *realistically* recites that *"Since in every instance labor unions are seeking agreements with employers on wages, hours and working conditions, and in every such instance both the employer and the union have a strong (albeit separate) motive for extending such agreement to other employers in the same field, it would be simple to defeat the national policy of encouraging collective bargaining by allowing easy implication of*

union-employer antitrust conspiracies". The Sixth Circuit's opinion herein has achieved national labor policy's defeat.

E. THE NEED FOR THIS COURT'S GUIDANCE IN PENDING CASES INVOLVING SIMILAR CLAIMS EMPHASIZES THE IMPORTANCE OF THE WRIT'S ISSUANCE HEREIN.

Exclusive of the instant case, there are currently pending in federal district courts cases wherein coal producers seek damages against UMW in an amount, when trebled, exceeding 3 million dollars and in the Sixth Circuit two cases, when trebled, aggregating 23 million dollars.[28] All cases are grounded in claims similar to or identical with that in the instant case and all involve the same issue of charged conspiracy under *Sherman*. Cases pending in district courts are within the Sixth Circuit's jurisdiction (other than one pending in a district court within that of the Seventh Circuit). Of the pending cases, three will be concerned with jury trials. As indicated herein, rulings of the Sixth Circuit have

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Style	Action No.	Court	Amount	Date Filed
Big Three Coal Co., Inc. v. *UMW*	CV 68-1115-D	USDC, E.D., Ill.	$ 2,473,545.00	1962
Scotia Coal Co. v. *UMW*	308	USDC, E.D., Ky.	802,500.00	1966
South-East Coal Co. v. *UMW*	19,623	USCA, 6 Cir.	7,566,356.00	1966
George Ramsey, et al. v. *UMW:*				
District Court	3667	USDC, E.D., Tenn., S.D.	15,150,000.00	1961
Sixth Circuit	17,878	USCA, 6 Cir.		

[Note:] In *Ramsey*, the district court exonerated UMW of the conspiracy charged; an equally divided court in the Sixth Circuit affirmed the district court. Mandate stayed pending filing of petition for writ of certiorari by plaintiffs.

been inconsistent and those herein are erroneous. Heretofore, certiorari has been awarded "because determination of the issue raised here will guide adjustment of a large body of similar claims now pending" *(Alcoa S.S. Co., Inc.* v. *U. S.*, 338 U.S. 421, 423), or because "the incidence of the problem involved in this case is extensive and the treatment it has received calls for clarification" *(Local 761, Int. Union, etc. Workers* v. *NLRB*, 366 U.S. 667, 671), or because of the "importance of the principal question" *(U. S.* v. *Standard Oil Co.*, 332 U.S. 301, 302).

The need for this Court's guidance, particularly in cases involving jury trials, should impel issuance of the Writ herein.

F. THE SIXTH CIRCUIT'S SANCTION OF THE DISTRICT COURT'S REFUSAL TO STRIKE THE JURY PANEL IS OFFENSIVE TO PRIOR DECISIONS OF THIS COURT AND OF THE FIFTH CIRCUIT.

The Jury Selection and Service Act of 1968[29] was enacted because the "key man" system, coupled with the practice of objective screening, consistently failed to produce representative jury venires. Senate Report No. 891, relating to the Jury Selection and Service Act of 1968, makes this precise point: "The actuality of *unintentional discrimination* was documented only recently in the case of *Rabinowitz v. United States*, 366 F.2d 34 (1966). In that case, the operation of the key man system in one set of circumstances was condemned *even though it was stipulated that the officials responsible for selection did not consciously engage in discriminatory practices.* En banc, . . the Fifth Circuit concluded that the key man system in question led to a

[29]28 USCA 1861, *et seq.*, as amended, 1969 USCA Cumulative Annual Pocket Part, Sections 1861-64, Public Law 90-274, Section 101.

jury list that did not represent a fair cross section of the community". *Congressional Record,* Vol. 113, Pt. 26, p. 35628 (December 8, 1967).

It further states the "key man" system's discriminatory impact "is by no means limited to racial discrimination" but also affects others, including *laborers.*

The Sixth Circuit's sanction of the district court's refusal to strike the jury panel herein is offensive, not only to *Rabinowitz,* but also to this Court's *Thiel* (328 U.S. 217), as discussed, *ante,* p. 20.

CONCLUSION

For the reasons assigned, Petitioner prays that the Petition for Writ of Certiorari should be granted and that the writ issue to review the judgments, orders and as aforesaid. Petitioner intends to urge each of the points and questions presented, though not argued herein.

Respectfully submitted,

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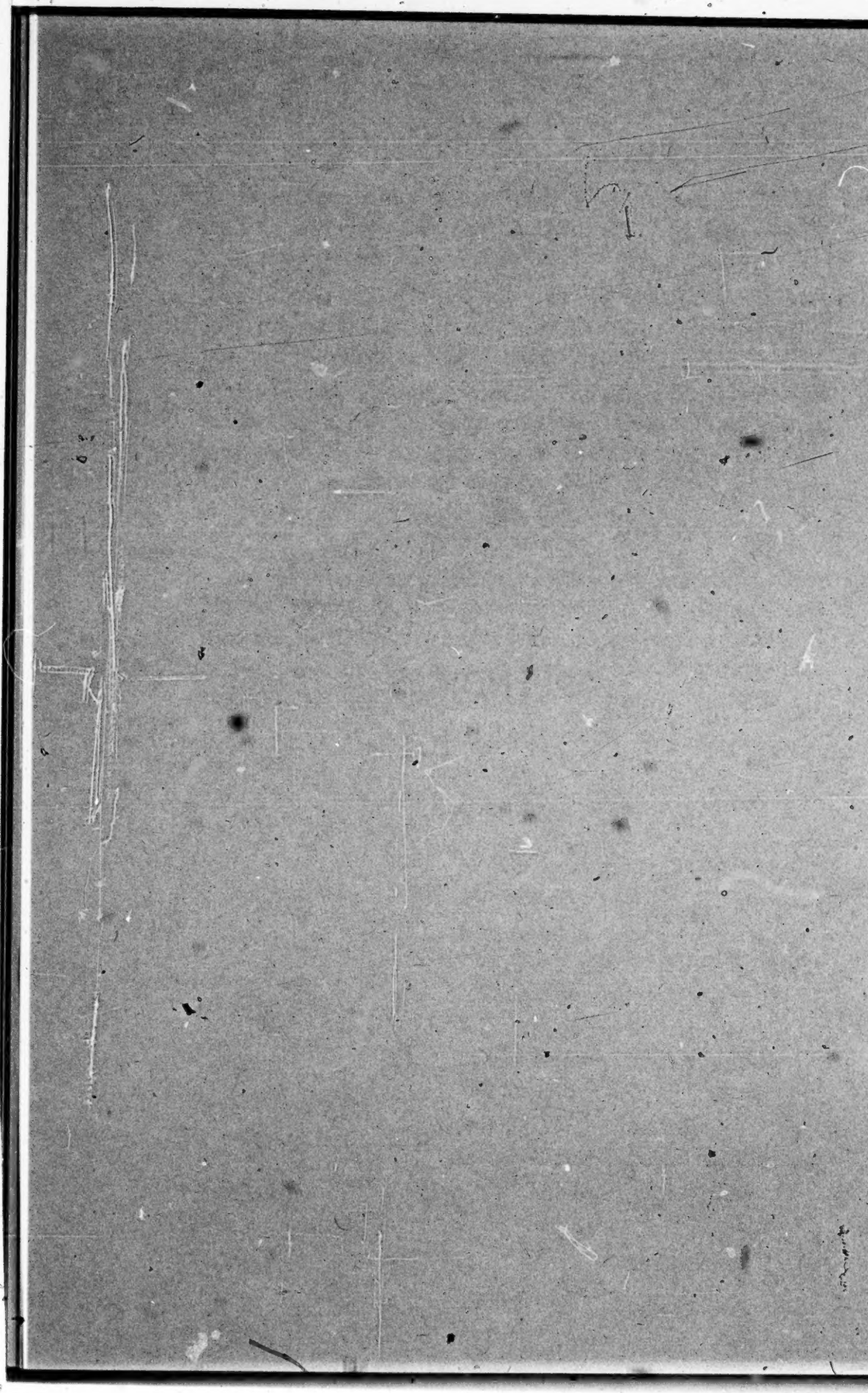

APPENDIX A

Filed September 19, 1969

No. 18820

United States Court of Appeals

FOR THE SIXTH CIRCUIT

TENNESSEE CONSOLIDATED COAL COMPANY and GRUNDY COAL COMPANY *Plaintiffs-Appellees,* v UNITED MINE WORKERS OF AMERICA *Defendant-Appellant.*	APPEAL from the United States District Court for the Eastern District of Tennessee, Southern Division.

Decided September 19, 1969

Before WEICK, Chief Judge, PECK and COMBS, Circuit Judges.

WEICK, Chief Judge. The suit in the District Court was brought by Tennessee Consolidated Coal Company (TCC) and its subsidiary, Grundy Mining Company (Grundy), against United Mine Workers of America (UMW) and West Kentucky Coal Company (West Kentucky), to recover damages for violations of Sections 1 and 2 of the Sherman Act. 15 U.S.C. § § 1 and 2.

The plaintiffs charged that UMW and large coal companies who form the Bituminous Coal Operators Association (BCOA) engaged in an unlawful conspiracy to eliminate and suppress competition and production in the coal

industry and to control the Southern Appalachian and Southeastern Tennessee coal fields. The plan of the conspiracy was that only the coal operators who signed and complied with the National Bituminous Coal Wage Agreement of 1950 as amended, including the 1958 Supplement, the Protective Wage Clause (PWC), would be permitted to carry on operations in that territory. It was alleged that the small companies could not operate profitably under the provisions of the National Agreement; that those who did not sign were picketed by UMW with force and violence, were not permitted to operate, and were forced out of business; and that plaintiffs were damaged as a result of the conspiracy. It was further charged that UMW invested $25,000,000 in acquiring control of West Kentucky Coal Company and its subsidiary, Nashville Coal Company, which was one of the largest members of BCOA, and that a portion of the investment was used for operational expenses, including payments into UMW's pension fund. Plaintiffs further contend that bids made to the Tennessee Valley Authority in the late 1950's and subsequent years for coal contracts by the major coal companies, including West Kentucky, were at prices below the prices charged in their other markets and in instances were below cost. As a result of this predatory bidding, the plaintiffs were unable to obtain long term coal contracts.

UMW denied that it engaged in any conspiracy. It asserted that all it did was to engage in traditional union activities to promote uniform wages in the coal industry for the betterment of its members.

West Kentucky was voluntarily dismissed from the case without prejudice. The case was tried before a jury which returned a general verdict in favor of the plaintiffs and made findings on special issues as follows:

"GENERAL VERDICT FORM

(1) We, the jury, find the United Mine Workers of America did engage in a conspiracy, as alleged
(did-did not)
by the plaintiffs, to unreasonably restrain trade or to monopolize commerce in the bituminous coal industry outside or beyond the exemption granted by the anti-trust statutes to a labor organization and in violation of Section 1 or Section 2 of the Sherman Anti-trust Act.

(2) [If your answer to Issue No. (1) was that the defendant did violate the Sherman Act] We, the jury, find that the plaintiff, Tennessee Consolidated Coal Company, was damaged in its business or
(was-was not)
property as a proximate result of defendant's violation of the Sherman Act.

(3) [If your answer to Issue No. (2) was that Tennessee Consolidated Coal Company was damaged as a proximate result of defendant's violation of the Sherman Act] We assess damages for Tennessee Consolidated Coal Company in the following amount. $977,500

(4) [If your answer to Issue No. (1) was that defendant did violate the Sherman Act] We, the jury, find that the plaintiff, Grundy Mining Company was damaged in its business or property as
(was-was not)
a proximate result of defendant's violation of the Sherman Act.

(5) [If your answer to Issue No. (4) is that Grundy Mining Company was damaged as a proximate result of defendant's violation of the Sherman Act] We assess damages for Grundy Mining Company in the following amount. $22,500.

s/ R. O. DAVIS
Jury Foreman"

"SPECIAL ISSUES

(1) We, the jury, find that the United Mine Workers of America did so act as to forfeit its exemption under the antitrust laws.
(did-did not)

(2) We, the jury, find that prior to and apart from the National Bituminous Coal Wage Agreement as amended in 1958, the defendant, United Mine Workers of America, did not conspire, combine or conspire, combine or contract with the coal operators who signed the National Agreement that it would contract with non-signatory operators only upon the terms and conditions of the National Bituminous Coal Wage Agreement as amended from time to time.
(did-did not)

(3) We, the jury, find that the United Mine Workers of America and signatories of the National Bituminous Coal Wage Agreement as amended in 1958 did intend that by the terms of the Protective Wage Clause the United Mine Workers of America agreed that it would contract with non-signatory operators only upon the terms and conditions of the National Bituminous Coal Wage Agreement as amended from time to time.
(did-did not)

s/ R. O. DAVIS
Jury Foreman"

UMW then filed a motion for judgment notwithstanding the verdict and in the alternative for a new trial which the court carefully considered in an opinion appearing on 41 pages of the printed record. 102a-143a.

The District Court found that the damages in the amount of $977,500 awarded to TCC by the jury were excessive and suggested a remittitur of $500,000, which was accepted by TCC. The court then denied the motion

for judgment notwithstanding the verdict and the motion for a new trial, and entered judgment in favor of TCC against UMW in the amount of $1,432,500 and in favor of Grundy in the amount of $67,500, being three times the amount of actual damages sustained by them. The Court allowed $150,000 attorneys fees to counsel for plaintiffs.

UMW has appealed. The parties have filed extensive well written briefs, a record consisting of four large volumes of a Joint Appendix and two supplements thereto, in addition to an appendix attached to one of the briefs.

Sufficiency of the Evidence

TCC was organized as a corporation in 1905 and owned about 50,000 acres of land in southeastern Tennessee on a portion of which prior to 1959 it was engaged in mining coal. TCC had leased a substantial portion of its coal-bearing land for mining properties to small truck mine operators.

UMW, an international labor union organized in 1905, had represented a majority of mine workers in the southeastern Tennessee coal fields for many years.

The facts of the case appear in the opinion of the District Court, previously mentioned, and in his reported opinion in *Ramsey* v. *United Mine Workers*, 265 F.Supp. 388 (E.D. Tenn. 1967). *Ramsey* was an anti-trust action tried by the same Judge, but without a jury, and resulted in a judgment in favor of UMW which was affirmed by an equally divided court in *Ramsey* v. *United Mine Workers*, —F.2d—(6th Cir. 1969). The only significant difference between the evidence as introduced in *Ramsey* and as fully set forth in that opinion and the evidence in the present case was evidence of violence in the southeastern Tennessee coal fields discussed on pages 428-429 in the

Ramsey opinion and omitted in the case at bar. Additional evidence was introduced relating to the Protective Wage Clause, consisting of minutes of the Joint Industry Contract Committee which functioned as a joint enforcement effort on the part of UMW and the signatory operators following the 1958 Amendment to the National Bituminous Coal Wage Agreement. We will therefore not restate the facts except when necessary for purposes of clarity.

UMW points out that the court in *Ramsey*, on almost identical evidence as in the present case, and another District Court in *Lewis* v. *Pennington*, 257 F.Supp. 815 (E.D. Tenn. 1966), with quite similar evidence, resolved the issues of liability in favor of UMW, and that we affirmed the judgment in *Pennington*. 400 F.2d 806 (6th Cir. 1968). UMW argues that it was therefore wrong for the jury to resolve the factual issues differently and that the verdict and judgment should be set aside and the complaint dismissed.

The doctrine of res judicata has no application as the present case involves different plaintiffs, who were not parties or privies to *Ramsey* or *Pennington*. *Lawlor* v. *National Screen Serv. Corp.*, 349 U. S. 322, 329 (1955).

The judge who heard *Ramsey* without a jury also presided at the jury trial in the present case. The evidence was conflicting. The judge did not think that the jury in the present case was bound by his factual findings in *Ramsey*. Neither do we.

In *Fox West Coast Theaters Corp.* v. *Paradise Theatre Bldg. Corp.*, 264 F.2d 602, 605 (9th Cir. 1958), the court said:

> "But is must be kept in mind that this is a question of fact which the jury has decided against appellants.

> It makes no difference that the jury found the facts and the intentions of the parties proved a conspiracy here, whereas a trial judge, sitting without a jury, found to the contrary on somewhat similar facts and his findings and judgment were affirmed by this Court. See Fanchon & Marco, Inc. v. Paramount Pictures, Inc., 9 Cir. 215 F.2d 167. There is no power in this Court to reverse a verdict on such grounds. The only problem is whether there was sufficient evidence to submit to the jury. This is a problem of law."

The only test to be applied by us is whether the verdict of the jury is supported by substantial evidence. The District Court in the present case found substantial evidence to support the verdict of the jury. We agree.

We should also point out that *Pennington,* which involved similar evidence, was first tried before a jury. On appeal we held, in an opinion written by Judge Shackelford Miller, that the evidence was sufficient to take the case to the jury and that the District Judge did not err in denying UMW's motion for a directed verdict. *Pennington* v. *United Mine Workers,* 325 F.2d 804 (6th Cir. 1963). The Supreme Court in reviewing our decision held in *United Mine Workers* v. *Pennington,* 381 U.S. 657 (1965), that UMW's motion for a directed verdict and for judgment notwithstanding the verdict "were correctly denied." *Id.* at 661. It reversed because of errors in the admission of evidence and in instructions to the jury.

In subsequent retrials of *Pennington* and *Ramsey,* which were tried before courts without a jury, the courts resolved factual issues in favor of UMW. It was not suggested by either court that motions to dismiss should have been granted at the close of plaintiff's evidence or at the close of all of the evidence. The District Judge in the

present case was correct in denying motions for a directed verdict and for judgment notwithstanding the verdict.

Is the Jury's Finding on Issue No. 3 Supported by Substantial Evidence?

The National Bituminous Coal Wage Agreement of 1950 as amended, effective December 1, 1958, contained the Protective Wage Clause (PWC) which provides:

"PROTECTIVE WAGE CLAUSE

"The United Mine Workers of America (which, as used in this Clause, includes all of its Districts, Local Unions, Officers or Agents) and the Operators signatory hereto affirm their intention to maintain the integrity of this contract in all of its parts. The objective of this contract is to provide the maximum possible continuity and stability of employment under the conditions set forth herein. The parties hereto agree that bituminous coal mines shall be so operated as not to debase or lower the standards of wages, hours, safety requirements and other conditions of work, established by this contract. The parties recognizing their obligation each as to the other to exercise all possible efforts and means to attain these objectives further agree as follows:

A. During the period of this Contract, the United Mine Workers of America will not enter into, be a party to, nor will it permit any agreement or understanding covering any wages, hours or other conditions of work applicable to employees covered by this Contract on any basis other than those specified in this Contract or any applicable District Contract. The United Mine Workers of America will diligently perform and enforce without discrimination or favor the conditions of this paragraph and all other terms and conditions of this Contract and will use and exer-

cise its continuing best efforts to obtain full compliance therewith by each and all the parties signatory thereto."

The finding of the jury as to the intent of the clause reads:

> "We, the jury, find that the United Mine Workers of America and signatories of the National Bituminous Coal Wage Agreement as amended in 1958 did intend that by the terms of the protective wage clause, the United Mine Workers of America agreed that it would contract with nonsignatory operators only upon the terms and conditions of the National Bituminous Coal Wage Agreement as amended from time to time." (1781a)

The importance of this finding appears in the language of the Supreme Court in *Pennington*, where the Court said:

> "We have said that a union may make wage agreements with a multi-employer bargaining unit and may in pursuance of its own union interests seek to obtain the same terms from other employers. No case under the antitrust laws could be made out on evidence limited to such union behavior.[2] But we think a union forfeits its exemption from the antitrust laws when it is clearly shown that it has agreed with one set of employers to impose a certain wage scale on other bargaining units. One group of employers may not conspire to eliminate competitors from the in-

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[2] "Unilaterally, and without agreement with any employer group to do so, a union may adopt a uniform wage policy and seek vigorously to implement it even though it may suspect that some employers cannot effectively compete if they are required to pay the wage scale demanded by the union. The union need not gear its wage demands to wages which the weakest units in the industry can afford to pay. Such union conduct is not alone sufficient evidence to maintain a union-employer conspiracy charge under the Sherman Act. There must be additional direct or indirect evidence of the conspiracy. There was, of course, other evidence in this case, but we indicate no opinion as to its sufficiency."

> dustry and the union is liable with the employers if it becomes a party to the conspiracy. This is true even though the union's part in the scheme is an undertaking to secure the same wages, hours or other conditions of employment from the remaining employers in the industry." (*Id.* at 665-666).

UMW contends that the protective wage clause is clear and unambiguous and therefore the construction of the clause is for the court and not the jury. *Dale* v. *Preg.* 204 F.2d 434 (9th Cir. 1953). The trouble with this contention is that every court which thus far his undertaken to construe the clause has held it to be ambiguous. Judge Wilson so stated in *Ramsey* (265 F.Supp. 388 at 412), and in the present case. Judge Taylor in *Pennington* said: "The language in Paragraph A may not be as clear as it might be." 257 F.Supp. 815 at 862. On appeal, we held in *Pennington*: "The Protective Wage Clause is capable of two reasonable constructions . . ." 400 F.2d at 814.

Whether the terms of the contract are ambiguous is a question of law for the court to determine. *Steele* v. *McCargo,* 260 F.2d 753 (8th Cir. 1958). When the court has determined that the contract is ambiguous the terms of the contract are to be determined by the jury if the case is tried by a jury, or by the court if the case is tried by a court. Evidence of the surrounding circumstances and the practical construction of the parties is admissible to aid in its interpretation. *United States* v. *Continental Oil Co.,* 364 F.2d 516 (10th Cir. 1966); *Steele* v. *McCargo, supra; Hawkins* v. *Frick Reid Supply Corp.,* 154 F.2d 88 (5th Cir. 1946).

The record contains an admission by counsel for UMW that the PWC was a "quid pro quo." Paragraph A was demanded by BCOA. Paragraph B, containing the promise of the signatory operators, was demanded by UMW. In

this paragraph the operators agreed to boycott coal not produced in conformity with the national agreement. UMW faithfully complied with Paragraph A in all collective bargaining agreements which it entered into. UMW struck operators who refused to agree to the national contract. The record in *Ramsey* is replete with evidence of mass picketing, force and violence.

Paragraphs C and E of PWC set up a "Joint Industry Contract Committee" and Joint District Contract Committees to try UMW or any operator for violations of the provisions of the PWC.

Paragraph D required UMW to report to the Committees complete lists of all operators whose operations are under contract with the union.

Paragraph E required UMW to make available to the committees all contracts, agreements or understandings entered into by UMW with any operator.

The Joint Industry Contract Committee sent out forms to operators requiring them to certify that they had fully complied with the national agreement.

The District Judge, in construing PWC in *Ramsey*, said it did not contain an express commitment on the part of UMW not to bargain with any other operator on any terms other than the national agreement, but by a preponderance of the evidence he found that UMW did tacitly or impliedly so agree. Under the clear proof rule he held the commitment could not be implied in *Ramsey*.

In the drafting of such an important agreement as PWC, we can hardly assume that UMW and *BOAC* were represented by lawyers who were ignorant of the antitrust laws. Nor should we assume that knowledgeable

counsel would draft a written agreement in which the parties expressly agreed to violate the anti-trust laws.

The fact that officers and agents of UMW and of *BOAC* denied any agreement to impose the national contract on all operators was not conclusive on the jury, which had the right as well as the duty to consider their denials in the light of the other evidence in the case.

In the present case the District Judge in his opinion said:

> "Turning next to the defendant's contention that there was an absence of any evidence to support the verdict of the jury on Special Issue No. (3), relating to the P.W.C., the Court is of the opinion that this contention is likewise not sound. In support of its contention in this regard, the defendant again relies heavily upon the opinion both of this Court in the *Ramsey case* and the opinion of the Court in the *Pennington case* wherein each Court upon considering the evidence relating to the P.W.C., concluded that the P.W.C. should not be construed so as to forfeit the defendant's labor organization exemption from the antitrust laws. It should be pointed out that this conclusion in both the *Ramsey* case and the *Pennington* case was reached by the Court sitting as a trier of facts and on the basis of conflicting evidence. All that was heretofore said with regard to findings of fact in the *Ramsey* and *Pennington* cases contrary to the verdict of the jury in this case not being the test of the sufficiency of the evidence to support the present verdict would be equally applicable here. Again, it should be repeated that the true test of the verdict is whether substantial evidence exists in the record to support the verdict. While once again if this Court were not called upon to weigh the evidence as a trier of facts it would reach the same conclusion with respect to the meaning of the P.W.C. as it reached in the *Ramsey* case, the

Court is nevertheless of the opinion that substantial evidence exists in support of a contrary conclusion."

We agree with the District Court that the finding of the jury is supported by substantial evidence.

Did the District Court Misinterpret the Jury's General Verdict in Holding That It Was Not Dependent Upon the Jury's Special Issue Finding As to the Protective Wage Clause?

In considering this issue on the UMW's motion for judgment notwithstanding the verdict, the District Court held:

> "Turning finally to the defendant's contention as to the effect on the general verdict of the jury's verdict on the P.W.C., as found in Special Issue No. (3), it should be borne in mind that the general verdict is not necessarily dependent upon the verdict on Special Issue No. (3). In considering the general verdict, the Court must look to all of the evidence and not merely the evidence in regard to the P.W.C. Moreover, in arriving at their general verdict the jury was charged with the duty of determining whether the defendant had committed an antitrust violation during the period of September 24, 1959, through the end of 1963, the period of limitations of this lawsuit. Evidence of conduct prior to September 24, 1959, was relevant only as it may or may not have reflected upon what the defendant did or refrained from doing during the period following September 24, 1959. Thus, neither Special Issue No. (2), wherein the jury found the defendant had not conspired prior to the 1958 Amendment with any coal operators to impose the conditions of the National Bituminous Coal Wage Agreement upon other coal operators, nor Special Issue No. (3), wherein the jury found that the defendant intended by the language of the P.W.C. to commit itself to impose the National Bituminous

> Coal Wage Agreement on all coal operators with whom it thereafter negotiated, would necessarily be determinative of the general verdict on the issue of liability. The Court is accordingly of the opinion that there does exist substantial evidence in the record in support of the jury verdict on the issue of liability." (p. 121).

UMW contends that the general verdict must be read in conjunction with Special Issue No. (2) in which the jury found that "*prior to and apart ~~from~~*" (emphasis added) the National Bituminous Coal Wage Agreement as amended in 1958, the UMW did not conspire with the coal operators to impose the terms of the National Agreement upon non-signatories. UMW submits that the "prior to and apart from" language limits the basis of liability in the general verdict to the protective wage clause alone. UMW argues the doctrine of *inclusio unius est exclusio alterius* and concludes that the general verdict cannot be supported by a finding of predatory pricing by West Kentucky since there was no special finding by the jury on that issue. Since the issue of predatory conspiracy was not found specifically by the jury, UMW contends that it was removed from the case. UMW does not cite any authority to support its contention.

Plaintiffs argue that the finding of the jury under Special Issue No. (2) did not exonerate UMW from conspiratorial conduct. Plaintiffs insist that the issue of predatory conspiracy as well as the protective wage clause was submitted to the jury and that counsel argued both issues to the jury. (1736a-1742a). The special issues were submitted by the Court to the jury over UMW's objection after counsel's arguments. In submitting the special issues Judge Wilson said:

> "Now then, ladies and gentlemen, in addition to the general verdict form, the Court will ask that you respond to certain special issues. By asking that you respond to these special issues, the Court does not suggest by any means that these are the only issues that will be for your decision, you are to decide all issues in accordance with the instructions of the Court, but the Court does request that you respond also to these issues in addition to your response to the issues as set forth in the general verdict form."

Under Rule 49 (b) of the Federal Rules of Civil Procedure the court may require a jury to return a general verdict accompanied by answers to written interrogatories upon one or more issues of fact, the decision of which is necessary to the verdict. The form of the interrogatories submitted to the jury is within the discretion of the trial judge. *Erwin* v. *Keck*, 351 F.2d 403 (6th Cir. 1965). Rule 49(b) provides:

> "When the answers are consistent with each other but one or more is inconsistent with the general verdict, judgment may be entered pursuant to Rule 58 in accordance with the answers, notwithstanding the general verdict, or the court may return the jury for further consideration of its answers and verdict or may order a new trial."

In interpreting this section of Rule 49(b) the Tenth Circuit held in *Kirkendoll* v. *Newstrom*, 379 F.2d 694 (10th Cir. 1967), that where, after answers to special interrogatories were read, the court asked if there was any reason why the jury should not be discharged and both parties answered in the negative, defendant had acquiesced in the court's discharging the jury and thereby waived any objection to the general verdict on grounds of inconsistency with a special finding. *Cundiff* v. *Washburn*, 393 F.2d 505 (7th Cir. 1968); *Employers Casualty Co.* v. *Dupaquier*,

338 F.2d 336 (5th Cir. 1964). The court further held in *Kirkendoll*, in considering whether there was an inconsistency between special findings and the general verdict, every reasonable indulgence should be made in favor of the general verdict. (*Id.* at 699). It was the duty of the court to harmonize the answers of the jury to interrogatories if it is possible under a fair reading of them. If there is a view of the case that makes the jury's answers consistent, they must be resolved that way. *Gallick v Baltimore & Ohio R.R. Co.*, 372 U.S. 108, 119 (1963).

In the present case after the jury returned its findings on the special issues and its general verdict the court inquired:

> "Is there anything further that any counsel wishes to raise before the Court excuses the jury in this case?" (1783a).

Counsel for both parties replied negatively and the jury was discharged. If counsel for UMW thought the special findings were inconsistent, unclear or ambiguous, he should have raised his objections at that time. Had objections been made, the court could have resubmitted them to the jury for further consideration. Furthermore, UMW had ample opportunity to submit its own interrogatories on the issue of predatory conspiracy when the court submitted its interrogatories. Having failed to take advantage of these two opportunities, and having failed to object to instructions to the jury on the issue of a predatory conspiracy, UMW cannot now be heard to claim that the issue was not included in the general verdict.

The view adopted by the District Judge in his opinion is consistent with the jury's answers. We approve it.

The Court's Instructions to the Jury

The court's instructions to the jury appear on sixty-five pages of the printed record. They were carefully prepared and covered a multitude of issues and questions raised by the parties. UMW made many objections to the charge. Its objections are stated at length on eleven pages of the record.

The court thoroughly explained to the jury the nature of the case, the respective contentions of the parties, and defined the issues and the law applicable thereto.

Instructions to a jury in a protracted and complex antitrust case are not the easiest type of instructions for a trial judge to prepare. We have carefully examined the instructions and are of the opinion that they stated the respective contentions of the parties fairly, defined the issues properly, and applied the law favorably to UMW.

The principal complaint of UMW is that the District Judge did not apply to all of the issues in the case Section 6 of the Norris-LaGuardia Act (29 U.S.C. § 106) which requires that liability of a labor organization for the acts of its officers, agents and members, be shown by clear proof. UMW did concede, however, that damages need be shown only by a preponderance of the evidence.

Section 6 does provide that participation, authorization or ratification must be shown by clear proof. Section 6 does not state that the unlawful acts must be shown by clear proof.

The District Judge, after discussing the preponderance rule in his charge, stated:

> "Now, ladies and gentlemen, there is one issue in this case upon which the plaintiffs have a heavier burden of proof than I have just described. That is

whether the defendant actually participated in or actually authorized or actually ratified actions which violated the Sherman Act, or other Federal Antitrust Laws. The labor union may not be held legally responsible for or legally liable for unlawful acts committed by its officers, its agents or its members, unless it has been shown by a clear-by clear proof, that the union actually participated in or actually authorized such acts, or ratified them after having actual knowledge of them. In this regard, you are instructed that before liability can be imposed upon a labor organization such as the defendant, Section 6 of the Norris-LaGuardia Act requires that the liability of labor organizations for the acts of officers, members, agents or others, be made to appear by clear proof. The act reads in this regard as follows:

" 'No officer or member of any association or organization, and no association or organization participating or interested in a labor dispute, shall be held responsible for [sic] liable in any court of the United States for the unlawful acts of individual officers, members or agents, except upon clear proof of actual participation in or actual authorization of such acts or a ratification of such acts, after actual knowledge.'

"Thus, labor unions may not be held liable for the acts of officers or members or agents or third parties, without clear proof that the labor union actually participated, gave prior authorization or ratified such act after full knowledge of their commission. In this case, before you can find the defendant union was a member of a conspiracy or a party to any agreement or combination to violate the Sherman Act as alleged by the plaintiff, you must find by clear proof that the union actually participated in, authorized or ratified such conspiracy, agreement or combination. In meeting the standards of clear proof, the plaintiffs are not required to satisfy the standards of proof of beyond a reasonable doubt, which is the standard of proof required in criminal cases. However, the plaintiffs

may not prevail upon this issue merely by carrying the burden of proof by a preponderance of the evidence.

"By clear proof is meant the clear, unequivocal and convincing proof. In order to establish that the defendant participated in, authorized or ratified an unlawful conspiracy agreement or combination, the plaintiff must show the same by clear, unequivocal and convincing proof.

"Now, upon each and every other issue in the case, the plaintiffs are merely required to establish their claims by a preponderance of the evidence, and needs [sic] not carry the burden of proof upon such issues by clear proof as I have defined those terms." (1703a-1705a).

In connection with this charge on conspiracy the District Judge said:

"Before the jury may find that a defendant or any other person has become a member of a conspiracy, the evidence must clearly show that the conspiracy was knowingly formed . . ." (1720a)

"Whenever it clearly appears from the evidence in the case that a conspiracy existed . . ." (1720a-1721a)

"If it clearly appears from the evidence in the case that the conspiracy alleged . . ." (1721a)

"What the evidence in the case must clearly show, before the plaintiffs are entitled to a verdict, is that the conspiracy alleged was knowingly formed and existed . . ." (1721a-1722a)

As if this were not enough, the court again repeated the clear proof rule:

"Now the defendant in this case, of course, is a labor union. A union can act only through its members, agents, including its employees and officers, therefore, in determining whether the union became a

member of a conspiracy as alleged by the plaintiffs, it is necessary for you to determine whether it became a party to such a conspiracy by virtue of the acts of its agents and members, and whether or not such agents and members were acting within the scope of their authority. In other words, it must be shown to your satisfaction by clear proof that the union authorized or ratified what was done by its representatives, or acted through its authorized agents or representatives in the matters alleged. Labor organizations are relieved, under the law from liability for damages or imputation of guilt, or lawless acts done in labor disputes by some individual officer or agent or member of the organization, unless there is clear proof that the organization charged with responsibility for the offense actually participated in, gave prior authorization for or ratified such acts after actual knowledge of their perpetration.

"The United Mine Workers may be held responsible for its acts in the formation of or carrying out of a conspiracy, or during the course of a labor dispute, there must be clear proof that the particular act charged or the act generally of that type and quality had been expressly authorized or necessarily followed from a granted authority by the union, or that such act or acts were subsequently ratified by the union, after actual knowledge of its occurrence." (1722a-1723a)

All of this still did not satisfy counsel for UMW, and after the District Judge had concluded his charge and objections were made thereto, the court charged further on the subject of clear proof:

"You will recall that in instructing the jury with reference to the burden of proof, I instructed the jury that the burden of proof rests in this case upon the plaintiffs and they are required to prove their claim by a preponderance of the evidence. I then proceed-

ed to define the matter of preponderance of the evidence, and I further instruct you as follows. Now there is one issue in this case upon which the plaintiffs had a heavier burden than that that I have described, that is, the issue of whether the defendant actually participated in or actually authorized or ratified actions which violated the Sherman Act, or the federal laws. A labor union may not be held legally responsible for or liable for unlawful acts committed by the officers, agents, or members, unless it has been shown by clear proof that the union actually participated in or actually authorized such acts, or ratified them after having actual knowledge thereof.

"In this regard you were instructed that before liability can be imposed upon a labor organization such as the defendant in this case, Section 6 of the Norris-LaGuardia Act requires that liability of a labor organization for acts of its officers, members, or agents must be made to appear by clear proof, before the defendant could be held liable thereon. I gave you at that time further instructions as to just what was meant by clear proof, and you will bear those instructions all in mind. Then I further instructed you, 'Now upon each and every other issue in the case, the plaintiffs are merely required to establish their claims by a preponderance of the evidence and need not carry the burden upon such issue by clear proof.'

"You will bear these instructions in mind together with all of the other instructions that I have given to you upon the burden of proof in this case. Now, to the extent that the Court may have instructed you otherwise, during any portion of the case or with reference to any specific issue in the case with respect to the purpose required or imposed upon the defendant, you will disregard that previous instruction and apply the instruction that I have now given to you, and as I have charged you originally with respect to the burden of proof." (1760a-1761a)

The plaintiffs might well have objected to the court's overemphasizing the defendant's theory of the case but in view of the verdict in their favor they were not prejudiced.

Other claimed errors in the court's instructions have been examined and in our judgment they do not merit discussion. We find no prejudicial error in the instructions.

Damages

In his opinion denying the motion for a new trial, the District Court in remitting $500,000 from the verdict, fully took into account UMW's claims that causes other than its violations of the anti-trust laws may have contributed to the damage. We see no basis for reducing the verdict further.

Did the District Court Err in Refusing to Strike the Jury Panel on the Claim That the "Key Man" System Failed to Produce a Venire Reflecting a Fair Cross-Section of the Community?

UMW raises three objections to the composition of and the method by which the jury panel was selected: (1) It contained a disproportionate percentage of salaried and management people and lacked a proportionate representation of wage earners, and thus violated 28 U.S.C. § 1864; (2) the suggesters upon whom the jury commissioners relied for names of potential jury members did not represent a fair cross-section of the community; and (3) the jury commissioners excluded potential jurors on non-statutory bases, e.g. on the basis of arbitrary personal discretion.

The District Court considered these contentions and rejected them in a full memorandum opinion, (75a-92a). As

for the first contention, the court concluded that the jury panel represented a wide assortment of occupations and that out of 120 names, 51 could be classified as laborers. The court found that there was no evidence of systematic and intentional exclusion of any group. The court rejected the second contention, holding that there was a substantial diversity among the suggesters consulted. Furthermore, there was no requirement that suggesters be from a cross-section of the community. Again the court concluded that there was no evidence of systematic or intentional exclusion of any cognizable group of eligible citizenry. Thirdly, the court held that the jury commissioners did not exclude individuals on non-statutory grounds. The court found that the jury commissioners had to have some discretion in placing names in the jury box if they were to get a fair cross-section. In most cases, names were rejected for medical or physical reasons.

Generally, the District Court found that although the jury commissioners could improve their practice by enlarging the sector of suggesters and by selecting jurors at random from the poll lists, the abuses which were found did not rise to the level of discrimination against any group.

This Court in *United States* v. *Hoffa*, 349 F.2d 20, 30-31 (6th Cir. 1965), *aff'd*, 385 U.S. 293 (1966), *rehearing denied*, 386 U.S. 951 (1967), upheld the "key man" system or use of suggesters and rejected arguments similar to the ones advanced here. In *Hoffa*, we stated:

> "While the purpose of using suggesters was to obtain an impartial jury drawn from the names of persons representing a cross-section of the community, we know of no requirement that the suggesters themselves be selected on such a basis. Nor is it necessary that every jury contain representa-

> tives of all the various classes and groups in the community. But prospective jurors shall be selected without systematic and intentional exclusion of any of the groups. The means whereby this may be accomplished rests within the sound discretion of the courts and their officers guided by statutory provisions. Thiel v. Southern Pacific Co., 328 U.S. 217, 66 S. Ct. 984, 90 L.Ed. 1181 (1946)." (*Id.* at 30)

This year we again upheld the "key man" system which was attacked in three Selective Service cases on the bases of economic and racial discrimination. *United States* v. *Mulloy*, —F.2d— (No. 18,710, 6th Cir. 1969); *United States* v. *Pratt*, —F.2d— (No. 18,709, 6th Cir. 1969); *United States* v. *Brooks*, —F.2d— (No. 18,679, 6th Cir. 1969).

UMW relies on *Rabinowitz* v. *United States*, 366 F.2d 34 (5th Cir. 1966), in which the Fifth Circuit held that the clerk of the court and the jury commissioner, in compiling the jury lists, violated the federal statutory scheme by excluding jurors on the basis of intelligence, character, and ability to "understand the cases that are tried in court." The court found that the jury lists did not represent a fair cross-section of the community in that Negroes were disproportionately represented. The court held that the method utilized to select the jury panel by the jury commissioner, and suggestions by his friends, did not comply with the statutory scheme.

In *Rabinowitz*, the court found that a particular definable group had been excluded. In the present case, the District Court found that no occupational or economic group had been excluded from the jury lists. The findings of the District Court are supported by substantial evidence and are not clearly erroneous.

We agree with the District Judge that there is no merit in the claim of UMW that TCC lacks standing to sue. *South Carolina Council of Milk Producers, Inc.* v. *Newton*, 360 F.2d 414 (4th Cir. 1966), *cert. denied*, 385 U.S. 934 (1966).

Affirmed.

Filed September 19, 1969

BEFORE: WEICK, Chief Judge, PECK and COMBS, Circuit Judges.

JUDGMENT

APPEAL from the United States District Court for the Eastern District of Tennessee

THIS CAUSE came on to be heard on the record from the United States District Court for the Eastern District of Tennessee and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby affirmed.

It is further ordered that Plaintiffs-Appellees recover from Defendant-Appellant the costs on appeal, as itemized below, and that execution therefor issue out of said District Court.

PETITION FOR REHEARING EN BANC

To the Honorable, the Chief Judge and the Circuit Judges of the United States Court of Appeals for the Sixth Circuit:

Pursuant to Rule 40, Federal Rules of Appellate Procedure, United Mine Workers of America (UMW), defendant-appellant, respectfully petitions this Honorable

Court for rehearing of the appeal in the entitled cause wherein this Court, by a panel consisting of Chief Judge Weick and Circuit Judges Peck and Combs, affirmed a judgment against UMW based on Sections 1 and 2 of the Sherman Act, 15 USC §§ 1 and 2, in favor of plaintiffs-appellees, Tennessee Consolidated Coal Company (TCC) and Grundy Mining Company (Grundy), in the respective amounts of $1,432,500 and $67,500, being three times the damages found to have been sustained by them, plus an allowance of an attorney's fee.

Pursuant to Rule 35, Federal Rules of Appellate Procedure, UMW suggests the appropriateness of a rehearing *en banc* to secure and maintain uniformity of this Court's decisions and, further, because of the exceptional importance of the questions involved.

In support of this Petition, UMW assigns the following grounds:

I. The Opinion erred in holding there was substantial evidence to support a verdict that UMW conspired with non-labor groups to increase labor costs or to reduce the market price of coal, *in conflict* with *Lewis* v. *Pennington*, 6 Cir., 400 F. 2d 806, *cert. denied* 393 U.S. 983 *("Second Pennington")* and Judge Edwards' opinion in *Ramsey* v. *UMW*, 6 Cir. — F. 2d —, 72 LRRM 2321.

II. The Opinion misapprehended Special Issue 2 in failing to attribute any significance, whatsoever, to the jury's response thereto that UMW did not conspire "prior to or apart from" the 1958 Agreement to contract with non-signatories only on the basis of the national contract, and in construing the general verdict to represent a general finding of conspiracy as though UMW had not been exonerated in part by the verdict of Special Issue 2.

III. The Opinion misapprehended Rule 49(b), Fed-

eral Rules of Civil Procedure, in holding it required UMW to object to the general verdict on grounds of inconsistency with the special verdict.

IV. The Opinion erred in finding that the meaning of the Protective Wage Clause (PWC) was for the jury to determine. It overlooked applicable legal principles and undisputed evidence in affirming the jury's verdict thereon.

V. The Opinion erred in finding that the District Court's instructions on the applicable standard of proof did not constitute prejudicial error. Its opinion thereon conflicts with *Second Pennington* and Judge Edwards' *Ramsey* opinion.

VI. The Opinion erred in holding, in effect, the District Court's instructions on "effects and consequences" of the acts of the alleged conspirators did not constitute prejudicial error. Its opinion conflicts with *Pennington* v. *Lewis*, 381 U.S. 657 (1963) [*"First Pennington"*] and *Second Pennington* thereon.

VII. The Opinion erred in finding that the award of damages was supported by the evidence and overlooked that such award was not consistent with national labor policy or contemplated by antitrust policy.

VIII. The Opinion erred in affirming the District Court's refusal to strike the jury panel.

ARGUMENT

A. The Petition To Rehear En Banc

Mr. Justice Frankfurter, in his concurring opinion in *Western Pacific Railroad Corporation* v. *Western Pacific Railroad Company*, 345 U.S. 247, made the following statement (270):

"Hearings en banc may be a resort . . . in cases extraordinary in scale—either because the amount involved is stupendous or because the issues are intricate enough to invoke the pooled wisdom of the circuit."

The case at bar is of the character contemplated by the above language. The judgment, insofar as we are aware, is the largest judgment yet affirmed against a labor union by any appellate court of the United States. But of greater importance on this petition is the fact that the questions involved in this case, as were the questions in the other two antitrust cases against UMW decided by this Court since the Supreme Court's decision in *First Pennington*, are unusually intricate and are of exceptional importance to the labor and antitrust policies of the United States. The intricacy of the issues is manifest from the opinions themselves. To be sure, the instant case represents the affirmation of a jury verdict whereas the opinions in *Second Pennington* and *Ramsey* represent the affirmance of dismissals of such claims against UMW in cases tried without a jury. This difference, however, merely underscores the difficulty which this Court has experienced with these cases. Plainly the questions involved are such as warrant consideration thereof on this petition *by the entire Court.*

B. The Grounds of the Petition

1. The verdict on Special Issue 2[1] found UMW did not conspire prior to or apart from the 1958 Agree-

[1] Special Issue 2 reads as follows:

"(2) We, the jury, find that prior to and apart from the National Bituminous Coal Wage Agreement as amended in 1958, the defendant, United Mine Workers of America, did not conspire, combine or conspire, combine or contract with the coal operators who signed the National Agreement that it would contract with nonsignatory operators only upon the terms and conditions of the National Bituminous Coal Wage Agreement as amended from time to time (Opinion, p. 4).

ment to contract with nonsignatory operators only upon terms of the 1958 Agreement. By Special Issue 3 the jury found that UMW and signatories to the 1958 Agreement did so intend by the Protective Wage Clause. These verdicts are consistent with each other and are consistent with the general verdict of conspiracy. Considered together the general and special verdicts mean precisely what they say: That UMW did not conspire prior to or apart from the 1958 Agreement.

This Court's Opinion misconceived the verdicts and UMW's position thereon. *The error is manifest from the failure to assign any meaning to Special Issue 2.* The opinion holds the general verdict represents a finding of predatory conspiracy apart from PWC, but this holding flies directly in the face of Special Issue 2. To give meaning, as the Court must, to Special Issue 2 is to hold the jury found a conspiracy not apart from but confined to PWC. To so find is to give meaning and consistency to the special and general verdicts; to assign a broader significance to the general verdict is to interpose an inconsistency where none would otherwise exist.

We repeat: *This Court's opinion gave no meaning to the verdict on Special Issue 2.* Its duty, however, is to "harmonize" the answer to that issue with the general verdict. Before a court may ignore a special verdict it "must attempt to reconcile the jury's findings by exegesis if necessary . . ." *Gallick* v. *Baltimore & Ohio R. Co.*, 372 U.S. 108, 119 (1963). And as the Supreme Court has also said, "Where there is *a view of the case* that makes the jury's answers to special interrogatories consistent, *they must be resolved that way.*"[2] *Atlantic & Gulf Stevedores* v. *Ellerman Lines*, 369 U.S. 355 (1962).

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[2] Unless otherwise stated, all emphasis herein are supplied.

The District Court's interpretation of the verdicts, which was approved by this Court, is demonstrably in conflict with those requirements. *Twice*, in its analysis of this question, the District Court, as quoted by this Court (Opinion, p. 12), *misstates* the scope of Special Issue 2. The District Court therein *confined* its consideration of Special Issue 2 as though it dealt only with what occurred "prior to" execution of the 1958 Agreement. Special Issue 2, however, required jury consideration of what occurred "prior to or apart from" the 1958 Agreement. The omission of the phrase "or apart from" in the District Court's exegesis signifies its misinterpretation and distortion of the verdicts and imparted to the verdict an inconsistency which would otherwise not exist. Moreover, it relegated the role of Special Issue 2 to that of a meaningless non-sequitur. This Court's approval confirmed that error. Here the jury, in fact, rejected the same conspiracy theory (of which PWC was not a part) which had been asserted by plaintiff in *First Pennington*.

2. The foregoing demonstrates this Court's error in holding, though the contention was not advanced by opposing counsel, that Rule 49(b) of the Federal Rules of Civil Procedure now bars assertion of UMW's contention with respect to the verdicts. UMW did not and does not now assert these verdicts are inconsistent. To the contrary, we urge that they are consistent, that Special Issue 2, which exonerated UMW from any conspiracy apart from PWC, is to be given meaning and that the general verdict is to be construed consistent with that meaning. Under no conceivable construction do we understand Rule 49(b) to bar that contention.

3. The verdict must stand on whether there is sufficient evidence to sustain the conspiracy finding relative

to PWC. On that issue the jury found UMW and signatory operators "did intend" that by the 1958 Agreement's PWC "that it (UMW) would contract with non-signatory operators only upon the terms" of the 1958 Agreement.

The verdict on PWC conflicts with *Second Pennington* and Judge Edwards' *Ramsey* opinion. *Second Pennington* holds PWC "properly construed" did not have the meaning found by the jury and that there was "insufficient evidence" from which to find a conspiracy. Judge Edwards' *Ramsey* opinion states, "We simply do not find language to support this (the plaintiffs') contention . . ." The irony of the instant case, if the above opinions mean what they say, is that it approves an improper construction of PWC and finds sufficient evidence where evidence was found insufficient before. The Court overlooked these affirmative statements in *Second Pennington* and *Ramsey* and overlooked, as well, as did the jury, the rule found applicable in *Second Pennington* that where a contract is capable of two constructions "construction *should be adopted* that does not result in a violation of the law". This Court's approval of submission to the jury of PWC's meaning ignores *Second Pennington's* holding that a *Sherman Act* conspiracy in this regard requires clear proof of "intention of driving competition out of business". On this issue there is an absence of evidence supporting the general verdict and the verdict on Special Issue 3.

This Court has repeatedly held PWC does not expressly violate antitrust laws. The other evidence in the record upon which the plaintiffs must rely to supply the unlawful meaning and intent does not make up the difference. To the contrary, *undisputed* evidence of UMW

wage policy challenges the meaning and intent plaintiffs' would assign to PWC. *First Pennington* holds "beyond question" UMW had the right to bargain for a uniform wage as a matter of its own policy. The other evidence in the record bespeaks of and is entirely consistent with the fact that such was UMW's policy. Indeed, a quest for a uniform wage has been UMW's policy since its inception in 1890.[3] That policy has been vigorously and successfully implemented since 1941. The question thus resolves itself to one of purpose.[4] Judge Edwards' *Ramsey* opinion makes this issue clear and he forcefully points out the danger to national policy of encouraging collective bargaining if "easy implication" of an anti-competitive purpose rather than a legitimate purpose is permitted. Basis for such implication is not found in this record.

But even assuming the evidence offered a probability on the issue of purpose, which UMW denies, the evidence presents at most a choice of probabilities. The jury's finding thereon is thus lacking in substantial evidence, even were the preponderance rule applicable. As stated in *Gulf Refining Co.* v. *Walker & Son Co.*, 6 Cir., 124 F. 2d 420, 425, ". . . to submit to a jury a choice of probabilities is but to permit them to conjecture or guess, and where the evidence presents no more than such choice, it is not substantial." Accord: *Troutman* v. *Mutual Life Ins. Co.*, 6 Cir., 125 F. 2d 769, 772; *U. S.* v. *Saunders*, 6 Cir., 325 F. 2d 840, 843.

The Court's Opinion ignores these revelant considerations.

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[3] The Opinion incorrectly refers to this date as 1905.

[4] PWC's purpose, as shown by unchallenged evidence, was to safeguard labor standards and job opportunities to which UMW members were contractually entitled. The validity and purpose of the clause has been judicially upheld. (*Lewis* v. *NLRB*, D.C. Cir. 350 F. 2d. 801)

It is material to note that PWC was not before the Supreme Court in *First Pennington*. Also material is the fact that that Court expressly pretermitted the question of the sufficiency of the evidence on the union-employer conspiracy charge there made. The Court said (fn. p. 664): " . . . we indicate no opinion as to its sufficiency."

4. What we have stated above is applicable to all aspects of the alleged predatory conspiracy, if those aspects are deemed within the general verdict. Whether broadly or narrowly construed, the verdict is not sustained by substantial evidence.

Contrary to the opinion (p. 6), UMW did not argue the jury was *bound* by the District Court's *Ramsey* findings. We argued that there was no genuine issue of material fact and that the evidence failed to sustain the asserted conspiracy to increase "labor costs" and to reduce "the market price of coal". Both this Court and the District Court stated there was conflicting evidence, but neither opinion specifies wherein the conflict exists and neither pointed to clear proof of UMW's participation therein. Not only is there not clear proof of UMW's participation in West Kentucky's[5] pricing policies, the opinion ignores uncontradicted evidence by witnesses for plaintiffs and UMW alike that UMW made no suggestions or proposed policies with reference to West Kentucky's or Nashville Coal's management or price policy.

5. This Court's opinion recognizes the applicability of

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[5] One of the points stressed in Judge O'Sullivan's *Ramsey* opinion, regarding evidence of a BCOA-UMW combine, is that West Kentucky Coal Company was "the biggest of the members of BCOA" (Opinion, p. 38). A similar statement is found in the opinion herein (Opinion, p. 2). The statements are inaccurate. West Kentucky was not a BCOA member nor did UMW have anything to do with BCOA's formation. (1566a). Of the alleged conspirators only two—Consolidation Coal and Pittston Coal—belonged (1565-66a).

the "clear proof" rule, yet departs from the meaning assigned to the rule in *Second Pennington.* There the Court viewed intent as an essential element of the conspiracy charged and held the conspiracy must be established by "clear proof." Here the Court held, as the District Court charged in effect, that clear proof applied to "participation, authorization and ratification" but that "unlawful acts" need not be thus established. Since, under *Second Pennington,* an act is not unlawful without intent, and since intent must be shown by clear proof, the distinction made herein is fundamental and, we submit, erroneous. The exception to the charge in this regard should have been sustained.

6. The charge on "effects and consequences", repeatedly given, was also erroneous, yet UMW's exceptions thereto were not discussed in the Opinion. The same effects may flow from that which is legal under *First Pennington,* as well as that which is illegal. Substitution of proof of effects in lieu of proof of conspiracy thus strips labor of its immunity, recognized in *First Pennington,* under the antitrust laws. In *Second Pennington* both this Court and the District Court rejected plaintiff's argument that a *Sherman* conspiracy could be proved by effects and consequences, and though this issue was vigorously pressed in a petition for certiorari, the Supreme Court denied the writ.

7. This Court affirmed the damage award reasoning the District Court excised, by remittitur, damages resulting from causes other than antitrust violations. (Opinion, p. 20). The Opinion overlooks, however, that the damages affirmed were based on losses sustained in a strike over economic issues and the refusal to bargain on the plaintiffs' part. National labor policy permits work-

ing men to refuse to work for wages not satisfactory to them and requires employers to bargain. The damage award conflicts with that basic policy. Nothing in *First Pennington* holds the antitrust laws override that policy.

8. In affirming the District Court's refusal to strike the jury panel, this Court recognizes *Rabinowitz* v. *U.S.*, 336 F. 2d 34, requires a panel stricken where it does not "represent a fair cross section of the community" but finds *Rabinowitz* inapplicable. It affirmed that representation of workingmen was not disproportionate—that 51 of the 120 names on the panel "could be classified as laborers" (Opinion p. 21). The finding is clearly in conflict with the evidence. As Appendix B to the District Court's Opinion (86-92A) and panel lists (Supp. App. pp. 5-19) for the earlier terms show, while 80% of the population consisted of non-supervisory wage earners, only 20-25% of the panel were of this classification. Their representation therefor was clearly disproportionate.

CONCLUSION

The foregoing demonstrates the errors in the District Court's judgment and its affirmance by this Court. We respectfully submit, therefore, that this petition should be granted and that UMW be granted the relief sought in its main brief.

Filed November 14, 1969

Order

Before WEICK, PECK and COMBS, Circuit Judges.

Upon consideration, it is ORDERED that the petition for rehearing herein be and it is hereby denied.

Entered by order of the Court.

CARL W. REUSS, *Clerk*

Filed November 21, 1969

ORDER

Before WEICK, PECK and COMBS, Circuit Judges.

This cause came on to be heard on the motion of plaintiffs-appellees for allowance of attorneys' fees for services rendered by their counsel in this Court, in which motion it was certified that in excess of three hundred hours had been expended by counsel up to the time of filing said motion, in work upon the printed appendix, brief and argument.

Taking into account the allowance made by the District Court, it is our opinion that $10,000. should be fixed in full for attorneys' fees for services rendered in this Court, and said sum is hereby allowed.

Entered by order of the Court.

CARL W. REUSS
Clerk

APPENDIX B

Filed April 23, 1968

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF TENNESSEE, SOUTHERN DIVISION

TENNESSEE CONSOLIDATED COAL CO. and GRUNDY MINING COMPANY —VS.— UNITED MINE WORKERS OF AMERICA	Civil Action No. 4178

OPINION

This is an action for alleged violation of the Federal Antitrust Laws by the defendant, a labor organization. The plaintiffs, Tennessee Consolidated Coal Company, Inc. and Grundy Mining Company, have each contended that the United Mine Workers of America has violated Sections 1 and 2 of the Sherman Antitrust Act (15 U.S.C., Sections 1 and 2) and have thereby caused damage unto the plaintiffs, for which each of them seeks treble damages. The lawsuit has now been tried before a jury with a verdict having been returned in favor of each plaintiff and against the defendant. The jury awarded damages unto Tennessee Consolidated Coal Company in the sum of $977,500.00 and awarded damages unto Grundy Mining Company in the sum of $22,500.00. These awards are before the trebling of damages and, if the verdicts are allowed to stand, each of the awards will be trebled in the judgment entered. The case is presently before the Court upon the motion of the defendant, United Mine Workers of America, for a judgment notwithstanding the verdict or in the alternative for a new trial. The case is also before the Court upon the plaintiffs' petition for the

setting of reasonable attorney fees to be awarded as a part of the judgment, all as provided by law in a civil antitrust action (15 U.S.C. 15).

The defendant's motion for judgment notwithstanding the verdict asserts 17 grounds upon which it is contended the verdict should be set aside and a judgment entered for the defendant. The defendant's alternative-motion for new trial asserts 31 grounds upon which it is contended the verdict should be set aside and a new trial granted. As may well be surmised from the number of grounds asserted, these motions are directed toward many facets of the case. Accordingly, a summary of the contentions of the respective parties, together with a statement of the issues determined in the verdict, will form a helpful predicate to a consideration of the grounds in the defendant's motions.

Tennessee Consolidated Coal Company (hereinafter referred to as "Tennessee Consolidated") is a corporation organized in 1905. It owns some 50,000 acres of land in Southeastern Tennessee, of which some 38,700 acres are coal bearing. It has its principal place of business within this area of Tennessee. Prior to 1959 Tennessee Consolidated was actively engaged in the mining of coal upon these lands, although even before that time it had leased a substantial portion of its coal bearing lands for mining operations to be conducted by others, principally relatively small truck mine operators.

Grundy Mining Company (hereinafter referred to as "Grundy") is a wholly owned subsidiary of Tennessee Consolidated, having been formed in 1959 by Tennessee Consolidated. Since that time it has confined its operations to the mining of coal upon lands owned by Tennessee Consolidated and has conducted its mining operations

under an agreement with Tennessee Consolidated whereby the latter would reimburse Grundy for all of its costs and in addition thereto pay Grundy the sum of five cents for each ton of coal produced by it. Since 1959 Tennessee Consolidated has not itself engaged directly in the mining of coal.

The United Mine Workers of America (hereinafter referred to as the U.M.W. of A.) is an international labor union first organized on January 25, 1890. For many years now it has represented the majority of the mine workers in the Southeastern Tennessee coal fields. Its activities in this area are under the direction of District 19, United Mine Workers of America, with headquarters located in Middlesboro, Kentucky. District 19 is not an autonomous district as are some districts within the U.M.W. of A., but rather is a provisional district with the district officers being appointed by the international president and approved by the International Executive Board. The local unions in the Southeastern Tennessee coal fields are of course autonomous and are subject to the supervision of the International Union only to the extent provided in their respective charters and the International Union Constitution.

Upon the trial of this case the plaintiffs contended that the defendant, U.M.W. of A., had over a number of years engaged in an unlawful conspiracy with certain coal operators to eliminate and suppress competition in the coal industry, to control the Southern Appalachian coal fields, and to suppress or eliminate the production of coal in the Southeastern Tennessee coal fields. This conspiracy was alleged to have violated Sections 1 and 2 of the Sherman Antitrust Act. It was alleged that the major coal producers in Pennsylvania, Ohio, and adjacent states,

including among others Consolidation Coal Company and Island Creek Coal Company, had, prior to 1950, largely dominated the production and marketing of coal in the Appalachian area. It was the plaintiffs' contention that this domination was threatened, however, by the rise of small independent producers during and following World War II. By 1949 and 1950 the coal industry in America was confronted with a problem of over production. Thereupon, commencing with the National Bituminous Coal Wage Agreement of 1950, it was contended that the U.M.W. of A. combined and conspired with major coal companies to force uniform wages, which only the larger companies could meet, on all coal producers in the nation, including those in the marginal seams, such as the plaintiffs. It was contended that the purpose of this conspiracy was to restrain competition from the many small producers who were operating under conditions where they could not perform the terms of the national contract, thus eliminating competition from the market and thereby permitting the market to be taken over by the major coal combines. The plaintiffs contended that successive amendments to the National Bituminous Coal Wage Agreement of 1950 between the U.M.W. of A. and the major coal producers in 1951, 1952, 1955, 1956, and 1958, raised wages to an exceedingly high level and increased the Welfare Fund royalty from 11¢ a ton to 40¢ a ton. It was alleged that these amendments were each a part of the same conspiracy and in furtherance of the same monopolistic practices. The plaintiffs contended that these successive increases in the wage scale and Welfare Fund payments were designed to meet the abilities of the major coal companies to mechanize and thereby not have their profits affected by increasing labor costs, the U.M.W. of A. all the while having full knowledge that

the smaller companies could not pay the wage scales and royalties and would therefore fall by the wayside. It was alleged that the U.M.W. of A. favored the coal industry being taken over by the large coal combines and in furtherance of this engaged in a campaign to impose the national wage contract upon the small independent and non-union mines. The plaintiffs further contended that to accelerate the demise of the small companies provisions were placed in the national contract whereby the operators agreed not to lease lands or purchase coal from non-signatories to the contract. It was further contended that in 1958 an amendment to the contract was negotiated whereby the U.M.W. of A. expressly agreed not to enter into any agreement with other coal operators upon any basis other than the national contract.

It was further contended by the plaintiffs that in the meantime the rapid expansion of the Tennessee Valley Authority (hereinafter referred to as T.V.A.) steam plant system during the 1950's resulted in the T.V.A. becoming the largest coal purchaser in the nation and that this called the attention of the conspirators to the Southern Appalachian region. Thereafter the U.M.W. of A. invested some $25,000,000 in coal companies, principally the West Kentucky Coal Company and its subsidiary, Nashville Coal Company, and these companies, along with other conspirators adopted the practice of predatory pricing to drive the T.V.A. coal market down to a level where the small coal producers could not compete upon that market. Large tonnages of coal were dumped on the T.V.A. market at consistently lower prices, according to the plaintiffs, with the conspiracy manifesting itself in the Southeastern Tennessee coal fields by a squeeze applied to the local operators both from the market price side and from the labor cost side. It was contended that while large pro-

ducers in other fields, including companies owned or dominated by the U.M.W. of A., applied downward pressure on the price of coal in the T.V.A. market, the U.M.W. of A. sought to raise labor costs by forcing the national contract on the plaintiffs, by interfering with production and by closing down the Southeastern Tennessee coal fields for long periods of time by means of strikes and work stoppages. The plaintiffs contended that the result of all of these acts was to drive a large number of small coal companies out of the coal industry and to put a large number of coal miners out of work. Each of the plaintiffs sought damages for the defendant's alleged monopolistic practices.

The U.M.W. of A. denied its participation in any conspiracy and denied that the plaintiffs were the victims of any antitrust violations on the part of the defendant. On the contrary, U. M. W. of A. contended that the plaintiffs were the victims of their own mismanagement, their own ineptness, their own failure and refusal to keep up with industry, and that they created their own labor turmoil either by refusing to enter collective bargaining agreements or by refusing to abide by the terms of the agreement which they had signed. U.M.W. of A. contended that its activities were at all times legitimate activities for a labor union, that it always acted to further the best interests of its members by arms' length bargaining with coal operators, and that its actions were at all times in accordance with the federal labor laws and the federal labor policy. The U.M.W. of A. contended that from its inception in 1890 it had consistently sought to unite all workers employed in the coal industry into one organization and that it had always vigorously sought to achieve national uniformity in wages, labor standards, and mine safety requirements. It contended that it had always re-

fused to subsidize marginal operators by agreeing to substandard labor conditions. It further contended that the 1950 National Bituminous Coal Wage Agreement was the result of good faith collective bargaining, which bargaining was conducted under the strict scrutiny and supervision of federal authorities, including federal courts, but denied any conspiracy to seek to drive any coal producers out of the industry. While not attempting to force mechanization upon the industry, the U.M.W. of A. early recognized that mechanization was the inevitable result of technological advances and of competition with other fuels and that accordingly it has never opposed such mechanization. On the contrary, it sought through collective bargaining to assure that its members would share in the benefits of increased productivity. The defendant contended that all amendments to the National Wage Agreement since 1950 have likewise been the result of good faith collective bargaining and not the result of any conspiracy as charged by the plaintiffs. The U.M.W. of A. denies that the Land Lease Clause or the clause in regard to subcontracting as contained in the National Bituminous Coal Wage Agreement was a part of any conspiracy aimed at small producers, but averred that these were solely to protect the integrity of the labor standards negotiated in the contract and to prevent signatories to the contract from using these means to escape from their obligations under the contract. The U.M.W. of A. contended that the Protective Wage Clause as negotiated in the 1958 Amendment was merely a commitment upon the part of the U.M.W. of A. to enforce the contract alike upon all signatories. The National Bituminous Coal Wage Agreement of 1950 and all of its subsequent amendments have been the result of good faith collective bargaining, the defendant contended, and have involved only traditional and lawful

labor union aims, policies, and activities. The U.M.W. of A. contended that loans and investments of union funds in West Kentucky Coal Company and in Nashville Coal Company were lawful loans and investments and were for lawful purposes and were not a part of any Sherman Act conspiracy. It denied that it ever sought to influence either the management or the coal sales policies of West Kentucky Coal Company or Nashville Coal Company and denied that it was a party to any such sales policies. Furthermore, the U.M.W. of A. contended that West Kentucky Coal Company never sought to depress the T.V.A. market and never engaged in predatory pricing of coal upon the T.V.A. market as alleged by the plaintiffs, but contended upon the contrary that West Kentucky Coal Company and Nashville Coal Company merely followed the market in submitting bids and sought coal sales for legitimate business purposes and at legitimate business prices.

The U.M.W. of A. contended that its activities in the Southeastern Tennessee coal fields were at all times legitimate and traditional labor union activities and it denied that they were a part of any Sherman Act conspiracy. The U.M.W. of A. contended that the plaintiffs fomented labor trouble and unrest in the Southeastern Tennessee coal fields by their own conduct and activities by failing and refusing to negotiate collective bargaining agreements with the U.M.W. of A., although it at all times represented the overwhelming number of coal miners in the area, and by repeatedly violating the conditions of any contract executed by them. The U.M.W. of A. averred that the plaintiffs' failure to remain competitive in the T.V.A. coal market was the result of mismanagement, the failure to keep abreast of modern production methods, the attempt to mine coal by hand or other antiquated methods

and other causes unrelated to labor costs or union activities. The U.M.W. of A. denied that the plaintiffs or either of them suffered any damage as a result of any Sherman Act conspiracy on its part.

Upon the trial of this case the evidence followed very closely the evidence introduced in a previous trial conducted in this court wherein a number of other coal operators in the Southeastern Tennessee coal field had sought to recover of the U.M.W. of A. for alleged Sherman Act violations. The previous antitrust action against the U.M.W. of A. was tried by the Court sitting without a jury and the Court's opinion summarizing the evidence and denying any recovery unto the plaintiffs upon that trial is reported in the case of *Ramsey* vs. *United Mine Workers of America,* 265 F.Supp. 388. The only significant differences in the evidence as introduced in the *Ramsey* case and as fully discussed by the Court in that opinion and the evidence introduced in the present jury trial were (1) evidence of violence in the Southeastern Tennessee coal fields, as discussed at pages 428-429 in the *Ramsey* opinion, was omitted upon the present trial and (2) additional evidence not introduced in the *Ramsey* trial was introduced in the present trial with respect to the Protective Wage Clause, this additional evidence consisting principally of the minutes of the Joint Industry Contract Committee, which Committee functioned as a joint enforcement effort on the part of the U.M.W. of A. and signatory operators following the 1958 Amendment to the National Bituminous Coal Wage Agreement.

Accordingly, reference to the opinion of this Court in the *Ramsey* case will suffice to summarize the evidence in the present case as it relates to the issue of liability, with the sole exception of the evidence of the minutes of

the Joint Industry Contract Committee as it relates to the interpretation of the Protective Wage Clause. With this exception, and with the exception of the evidence as it relates to the issue of damages, it will not be necessary for the Court to attempt a further statement of the evidence upon the present trial. Rather, the Court will here adopt and rely upon its opinion in *Ramsey* vs. *United Mine Workers of America*, 265 F.Supp. 388, with references being made to specific portions of that opinion as may from time to time become appropriate.

Following the trial of the present case, the case was submitted to the jury upon a general verdict. In its general verdict the jury found as follows:

"GENERAL VERDICT FORM

(1) We, the jury, find that the United Mine Workers of America ___did___ engage in a conspiracy, as
(did-did not)
alleged by the plaintiffs, to unreasonably restrain trade or to monopolize commerce in the bituminous coal industry outside or beyond the exemption granted by the antitrust statutes to a labor organization and in violation of Section 1 or Section 2 of the Sherman Antitrust Act.

(2) [If your answer to Issue No. (1) was that the defendant did violate the Sherman Act] We, the jury, find that the plaintiff, Tennessee Consolidated Coal Company, ___was___ damaged in its busi-
(was-was not)
ness or property as a proximate result of defendant's violation of the Sherman Act.

(3) [If your answer to Issue No. (2) was that Tennessee Consolidated Coal Company was damaged as a proximate result of defendant's violation of the Sherman Act] We assess damages for Tennessee Con-

solidated Coal Company in the following amount. $977,500

(4) [If your answer to Issue No. (1) was that defendant did violate the Sherman Act] We, the jury, find that the plaintiff, Grundy Mining Company _____ (was-was) damaged in its business or property as a proximate result of defendant's violation of the Sherman Act.

(5) [If your answer to Issue No. (4) is that Grundy Mining Company was damaged as a proximate result of defendant's violation of the Sherman Act] We assess damages for Grundy Mining Company in the following amount. $22,500

s/R. O. Davis

Jury Foreman"

In addition to the general verdict, the Court also submitted unto the jury three special issues. It should be pointed out that the three special issues submitted did not purport to cover all of the issues to be decided by the jury and the jury was specifically so instructed. The Court would have preferred to have submitted special issues on all issues for decision of the jury, but counsel for each side objected to the submission of any special issues and the Court was thereby prevented from having the assistance of counsel in framing a comprehensive set of special issues. The special issues decided by the jury were as follows:

"SPECIAL ISSUES

(1) We, the jury, find that the United Mine Workers of America did (did-did not) so act as to forfeit its exemption under the antitrust laws.

(2) We, the jury, find that prior to and apart from the National Bituminous Coal Wage Agreement as amended in 1958, the defendant, United Mine Workers of America, did not (did-did not) conspire, combine or contract with the coal operators who signed the National Agreement that it would contract with non-signatory operators only upon the terms and conditions of the National Bituminous Coal Wage Agreement as amended from time to time.

(3) We, the jury, find that the United Mine Workers of America and signatories of the National Bituminous Coal Wage Agreement as amended in 1958 (did-did not) intend that by the terms of the Protective Wage Clause the United Mine Workers of America agreed that it would contract with non-signatory operators only upon the terms and conditions of the National Bituminous Coal Wage Agreement as amended from time to time.

s/R. O. Davis
Jury Foreman"

Taking up first the defendant's motion for judgment n.o.v., 16 of the 17 grounds asserted in the motion charge an absence of evidence either to support the verdict generally or to support some essential issue in the case. Ground 12 of the motion contends that Tennessee Consolidated, as a non-coal producing company, had no status to maintain the lawsuit. Grounds 1 through 11 asserted an absence of sufficient evidence to allow a verdict to stand on the issue of liability and Grounds 13 through 17 asserted an absence of sufficient evidence to allow a verdict to stand on the issue of damages.

Grounds 1 through 4 assert generally that there was no evidence to support the verdict. Grounds 5, 8, 9, 10,

and 11 contend that there was either no evidence or a lack of clear evidence of a Sherman Act violation by the defendant. Ground 6 contends that there was no evidence that the defendant had so acted as to forfeit its labor organization exemption from the antitrust laws. Ground 7 contends that there was no evidence that the Protective Wage Clause committed the defendant to contract with non-signatory coal operators only on the terms and conditions of the National Bituminous Coal Wage Agreement. Grounds 13 and 14 contend that there was either no evidence or a lack of clear evidence that the plaintiffs suffered any damages as a proximate result of a Sherman Act violation by the defendant. Grounds 15, 16, and 17 contend that there was no competent evidence of damage having been sustained on the part of each plaintiff.

Considering generally the defendant's contention that there was either a lack of any evidence or a lack of any clear evidence to support the verdict of the jury upon the issue of liability, the Court is of the opinion that there was sufficient evidence in the record to warrant submitting the issue of liability unto the jury. Rather than here attempt to summarize the evidence as it relates to the issue of liability, the Court will rely upon the statement of the evidence made in its decision in the case of *Ramsey* vs. *United Mine Workers of America*, 265 F. Supp. 388. In support of its contentions regarding an absence of sufficient evidence to warrant submitting the issue of liability unto the jury, the defendant too relies upon the opinion of this Court in the *Ramsey* case, as well as the opinion of Judge Robert L. Taylor in the case of *Lewis* vs. *Pennington*, 257 F.Supp. 815, in which cases each Court concluded that the plaintiff had failed to establish a Sherman Act violation on the part of the

U.M.W. of A. As noted above, the evidence in the *Ramsey* case, insofar as it related to the issue of liability, was almost identical to that presented in the present case. In fact, much of the evidence in the present case was read from the record in the *Ramsey* case. The evidence presented in the *Pennington* case was quite similar to that presented in the present case. The defendant, in addition to relying upon the summary of the evidence as stated in those opinions, also relies upon the factual and legal conclusions there reached by the Court. However, this Court is of the opinion that the factual and legal conclusions reached in the *Ramsey* and *Pennington* cases would not be conclusive in the present case as to the existence of a jury issue upon the question of liability.

Both the *Ramsey* and the *Pennington* cases were tried by the Court sitting without a jury. In other words, each Court there sat as a trier of the facts and each opinion constituted both the findings of fact and conclusions of law of the Court. If this Court were sitting as a trier of the facts in the present case, it would make the same findings of fact on the present record as it made upon the record in the *Ramsey* case. That, however, does not constitute the test of the existence of a jury issue in the present case. Rather, that test is whether substantial evidence exists in the record to support the verdict. *Hinton* v. *Dixie-Ohio Express Co.*, (C.A. 6) 188 F.2d 121; *Baltimore & Ohio Railway Co. v. Poston*, (C.A., D.C.) 177 F. 2d 53; *Dayton Venear & Lumber Mills* v. *Cincinnati N. O. & T. P. Railway Co.*, (C. A. 6, 1943) 132 F.2d 222. Where the sufficiency of the evidence to support the verdict is an issue, the Court does not sit as a thirteenth juror, *Werthan Bag Corp.* v. *Agnew*, (C.A. 6, 1953) 202 F.2d 119, but rather is called upon to determine only whether there is substantial evidence to support the verdict.

Moore's Federal Practice, Vol. 6A, Sec. 5908(5). Although if this Court were itself weighing the evidence, it would conclude, as it did in the *Ramsey* case, that "reviewing the evidence as a whole. . . the Court is unable to find that the evidence clearly reflects that the plaintiffs were the victims of any conspiracy between the U.M.W. and any coal operators or other non-labor organization to eliminate or suppress competition in the coal industry or to eliminate or suppress the production and sale of coal by the plaintiffs," the Court cannot say that there is an absence of substantial evidence in the trial record in this case to support a contrary conclusion. Likewise, the fact that this Court in the *Ramsey* case and the Court in the *Pennington* case, while sitting as triers of fact, reached a different conclusion on the issue of liability than did the jury in the present case does not compel a conclusion that no substantial evidence exists in support of the verdict. As stated in the case of *Fox West Coast Theatres Corp.* vs. *Paradise Theatre*, (C.A. 9, 1958) 264 F.2d 602 at 605:

> "But it must be kept in mind that this is a question of fact which the jury has decided against appellants. It makes no difference that the jury found the facts and intentions of the parties proved a conspiracy here, whereas, a trial judge, sitting without a jury, found to the contrary on somewhat similar facts and his findings and judgment were affirmed by this Court. See *Fanchon & Marco, Inc.*, v. *Paramount Pictures, Inc.*, 9 Cir., 215 F.2d 167. There is no power in this Court to reverse a verdict on such grounds. The only problem is whether there was sufficient evidence to submit to the jury. This is a problem of law."

A substantial portion of the defendant's brief in support of its motion for judgment n.o.v., as well as its motion for new trial, is devoted to the proposition that the

jury's verdict on Special Issue No. (3), relating to the Protective Wage Clause (hereinafter referred to as the P.W.C.) as set forth in the 1958 Amendment of the National Bituminous Coal Wage Agreement was both in law and in fact erroneous. In Special Issue No. (3) the jury found:

> "We, the jury, find that the United Mine Workers of America and signatories of the National Bituminous Coal Wage Agreement as amended in 1958 did intend that by the terms of the Protective Wage Clause the United Mine Workers of America agreed that it would contract with non-signatory operators only upon the terms and conditions of the National Bituminous Coal Wage Agreement as amended from time to time."

The defendant's contentions with regard to the verdict on Special Issue No. (3) being erroneous and without support in the record may fairly be summarized in three propositions. First, it is contended by the defendant that no jury issue existed with respect to the language in the P.W.C., that language being clear and unambiguous and committing the U.M.W. of A. only to uniform enforcement of the contract with respect to coal operators who were signatories to the agreement, and leaving the U.M.W. of A. free to negotiate on such terms as it might choose with respect to non-signatory coal operators. Thus, it is contended that the P.W.C. could neither constitute a forfeiture of its labor organization exemption from the antitrust laws nor could it be violative of the Sherman Act. The language in the P.W.C. being unambiguous, it is the position of the defendant that the Court was in error in submitting to the jury the matter of the interpretation of that language. Second, it is contended by the defendant that there was no substantial

evidence to support the verdict of the jury in its finding that the defendant had committed itself by the language of the P.W.C. to negotiate with any non-signatory coal operator only on the terms of the National Bituminous Coal Wage Agreement. The defendant contends that the only verdict the jury could properly have reached under the evidence and the instructions of the Court was that the P.W.C. neither constituted a forfeiture of the defendant's labor organization exemption from the antitrust laws nor a violation of the Sherman Act. Third and finally, it is contended by the defendant that since the jury verdict upon Special Issue No. (3) was erroneous for either or both of the above stated reasons, and since the only lawful verdict with reference to the P.W.C. would be that it neither constituted a forfeiture of the defendant's labor organization exemption from the antitrust laws nor a violation of the Sherman Act, the general verdict of the jury must likewise be erroneous, the only lawful general verdict being that the defendant neither for feited its labor organization exemption from the antitrust laws nor violated the Sherman Act.

Considering first the defendant's contention that no jury issue existed with reference to the P.W.C. as the language of that provision in the 1958 Amendment to the National Bituminous Coal Wage Agreement was clear and unambiguous, the Court is of the opinion that this contention is not sound. The first sentence of Paragraph A of the P.W.C. reads as follows:

> "During the period of this contract, the United Mine Workers of America will not enter into, be a party to, nor will it permit any agreement or understanding covering any wages, hours, or other conditions of work applicable to employees covered by this contract on any basis other than those specified in this contract or on any applicable district contract."

The defendant contends that the foregoing language commits the Union only to enforce the contract uniformly as between parties signatory to the contract, which leaves the Union free to bargain upon any terms it sees fit with non-signatory operators. The defendant asserts that the remaining language in the P.W.C. substantiates this construction. The plaintiffs, on the other hand, contend that the above language means that the defendant agreed that it would not enter into a contract with any other party or bargaining unit upon any terms other than the National Bituminous Coal Wage Agreement. The plaintiff asserts that the remaining language of the P.W.C. substantiates that construction.

The Court is of the opinion that neither interpretation is clearly established by reference to the language of the agreement but rather that the intention of the parties cannot be ascertained without looking beyond the language of the agreement. Had the interpretation of the defendant been the intention of the parties, the agreement could readily have so stated by inserting the phrase "applicable to employees covered by this contract" immediately after the words "agreement or understanding." The agreement would then have read:

> "During the period of this contract, the United Mine Workers of America will not enter into, be a party to, nor will it permit any agreement or understanding *applicable to employees covered by this contract* covering any wages, hours, or other conditions of work on any basis other than those specified in this contract or on any applicable district contract."

On the other hand, had the interpretation of the plaintiffs been the intention of the parties, the agreement could readily have so stated by omitting the language

"applicable to employees covered by this contract." The agreement would then have read:

> "During the period of this contract the United Mine Workers of America will not enter into, be a party to, nor will it permit any agreement or understanding covering any wages, hours, or other conditions of work on any basis other than those specified in this contract or on any applicable district contract."

In short, the Court is of the opinion that an ambiguity exists upon the face of the contract as to whether the phrase "applicable to employees covered by this contract" modifies the previous words "wages, hours, or other conditions of work" thereby identifying the wages, hours and working conditions that the U.M.W. of A. must include in any agreement or understanding with any other coal operators, all as contended by the plaintiffs, or whether the phrase "applicable to employees covered by this contract" modifies the previous words "agreement or understanding" thereby limiting U.M.W. of A.'s commitment to employees covered by the particular contract and leaving it free to negotiate any terms it desired with regard to wages, hours and working conditions of employees of other coal operators, all as contended by the defendant.

In neither the *Ramsey* case nor the *Pennington* case, *supra,* did the Court find the P.W.C. to be free of ambiguity. As stated by this Court in the *Ramsey* case, "The language used is not without ambiguity." 265 F.Supp. 388 at 412. As stated by the Court in the *Pennington* case, "The language in Paragraph A may not be as clear as it might be." 257 F.Supp. 815 at 862.

Having concluded that the language in the P.W.C. was ambiguous, its meaning became an issue of fact for deter-

mination by the jury under appropriate instructions from the Court and extrinsic evidence as to the surrounding circumstances, including the practical construction given by the parties, may be received in aid of its interpretation. *Steele vs. McCargo*, 260 F.2d 753; *Floyd vs. Ring Construction Corp.*, 165 F.2d 125; *Mutual Benefit Health and Accident Assoc. vs. Hobbs*, 186 F.2d 321; *Dale vs. Preg*, 204 F.2d 434; *Green vs. Aerosol Research Co.*, 374 F.2d 791; *Spartans Industries, Inc. vs. John Pilling Shoe Co.*, 263 F.2d 191; *Fuel Associates vs. Midwest-Raleigh, Inc.*, 374 F.2d 451; *Evensen vs. Pubco Petroleum Corp.*, 274 F.2d 866; *J. T. Majors & Sons, Inc. vs. Lippert Bros., Inc.*, 263 F.2d 650; *Hopkins vs. Brick-Reid Supply Corp.*, 154 F.2d 88; *United States vs. Continental Oil Company*, 354 F.2d 516.

Turning next to the defendant's contention that there was an absence of any evidence to support the verdict of the jury on Special Issue No. (3), relating to the P.W.C., the Court is of the opinion that this contention is likewise not sound. In support of its contention in this regard, the defendant again relies heavily upon the opinion both of this Court in the *Ramsey* case and the opinion of the Court in the *Pennington* case wherein each Court, upon considering the evidence relating to the P.W.C., concluded that the P.W.C. should not be construed so as to forfeit the defendant's labor organization exemption from the antitrust laws. It should be pointed out that this conclusion in both the *Ramsey* case and the *Pennington* case was reached by the Court sitting as a trier of facts and on the basis of conflicting evidence. All that was heretofore said with regard to findings of fact in the *Ramsey* and *Pennington* cases contrary to the verdict of the jury in this case not being the test of the sufficiency of the evidence to support the present verdict would be equally

applicable here. Again, it should be repeated that the true test of the verdict is whether substantial evidence exists in the record to support the verdict. While once again if this Court were now called upon to weigh the evidence as a trier of facts it would reach the same conclusion with respect to the meaning of the P.W.C. as it reached in the *Ramsey* case, the Court is nevertheless of the opinion that substantial evidence exists in support of a contrary conclusion.

Turning finally to the defendant's contention as to the effect on the general verdict of the jury's verdict on the P.W.C., as found in Special Issue No. (3), it should be borne in mind that the general verdict is not necessarily dependent upon the verdict on Special Issue No. (3). In considering the general verdict, the Court must look to all of the evidence and not merely the evidence in regard to the P.W.C. Moreover, in arriving at their general verdict the jury was charged with the duty of determining whether the defendant had committed an antitrust violation during the period of September 24, 1959, through the end of 1963, the period of limitations of this lawsuit. Evidence of conduct prior to September 24, 1959, was relevant only as it may or may not have reflected upon what the defendant did or refrained from doing during the period following September 24, 1959. Thus, neither Special Issue No. (2), wherein the jury found the defendant had not conspired prior to the 1958 Amendment with any coal operators to impose the conditions of the National Bituminous Coal Wage Agreement upon other coal operators, nor Special Issue No. (3), wherein the jury found that the defendant intended by the language of the P.W.C. to commit itself to impose the National Bituminous Coal Wage Agreement on all coal operators with whom it thereafter negotiated, would necessarily

be determinative of the general verdict on the issue of liability. The Court is accordingly of the opinion that there does exist substantial evidence in the record in support of the jury verdict on the issue of liability. In so holding the Court does not indicate its approval of that verdict in the sense that the Court concurs in the verdict, but only in the sense that the Court believes that there was substantial evidence in the record on which the verdict could have been based.

Having now reviewed Grounds 1 through 11 of the defendant's motion for judgment n.o.v., the Court is of the opinion that each of these failed to assert grounds for the granting of a judgment n.o.v.

Ground 12 of the defendant's motion contends that since the plaintiff, Tennessee Consolidated, ceased producing coal in March of 1960 and thereafter acted only as a coal sales agency or land company, it had no standing to maintain the present antitrust action as its injury was too remote and indirect to permit it to sue. In support of this position the defendant relies upon the cases of *Volasco Products Co.* v. *Fry Roofing Co.*, (C.A. 6, 1962) 388 F.2d 383 and *Love & Amos Coal Co.* v. *United Mine of America* (*United Mine Workers of America* v. *Osborne Mining Co.*), (C. A. 6, 1960) 229 F.2d 716. It is true that the undisputed evidence reflects that from and after March 1960 Tennessee Consolidated ceased the direct operation of any coal mines upon its lands. After that date it contracted first with Allen & Garcia, an independent mining engineering company, and then with Grundy Mining Company, a wholly owned subsidiary, to operate mines upon its coal lands. The Court, however, does not agree that this renders any losses sustained by Tennessee Consolidated as a result of the alleged Sherman Act con-

spiracy too remote to permit a recovery upon its part. In the first place, a jury issue existed under the evidence as to whether this alteration in Tennessee Consolidated's mode of operation was not itself a direct consequence of the alleged unlawful conspiracy. Tennessee Consolidated contended that it was forced to abandon its direct coal mining operations by reason of the unlawful activities of the U.M.W. of A. and that it then attempted to operate its mines through Allen & Garcia and Grundy Mining Company in an effort to avoid or minimize the effects of the U.M.W. of A.'s antitrust conspiracy. In the second place, the Court is of the opinion that the authority relied upon by the defendant does not involve analogous factual situations. In the *Volasco* case the Court held that a corporation supplying asphalt to a roofing manufacturer could not maintain an action for damages by reason of an antitrust violation directed at the roofing manufacturer, even though the asphalt corporation and the roofing manufacturer may have been wholly owned by the same stockholder. There the operation of two businesses through separate corporations was by election of the stockholder and that election was in no wise related to any alleged antitrust violation. In the *Love & Amos Coal Co.* case a coal sales agent was denied standing to recover for loss of coal sales due to a union violation of the Taft-Hartley Act, which union violation was directed toward a coal mining company whose coal was sold through the sales agent. Under these circumstances the sales agent's losses were held to be incidental and too remote to permit a recovery. In the *Volasco* case the asphalt supplier did not become a supplier as a result of an antitrust violation directed at it and in the *Love & Amos Coal Co.* case the coal sales agent did not become a sales agent as a result of a Taft-Hartley violation directed at it. In the present case,

however, it is contended that Tennessee Consolidated only ceased mining coal and sought to operate through Allen & Garcia and Grundy Mining Company as a consequence of the Sherman Act conspiracy directed toward it. The Court is of the opinion that under these circumstances a jury issue existed as to whether the loss of Tennessee Consolidated was a direct and proximate result of the alleged Sherman Act violation on the part of the defendant.

The remaining grounds in the defendant's motion for judgment n.o.v., Grounds 13 through 17, assert that the evidence was insufficient to warrant submitting unto the jury the issues of proximate cause and damages. The Court will have occasion to further consider these matters in connection with the defendant's motion for new trial. Suffice it for now to say that the Court is of the opinion that substantial evidence exists with respect to each of these issues so as to warrant submitting them unto the jury. The defendant's contentions in this regard are predicated in part upon the assumption that the only Sherman Act violation found by the jury was its interpretation of the Protective Wage Clause, as stated in Special Issue No. (3). In the Court's opinion this is not a valid assumption. The plaintiffs contended that they were the victims of a Sherman Act conspiracy that sought to accomplish its unlawful purpose both by increasing its labor costs and by reducing the market price of coal. There was evidence in the record sufficient to create a jury issue with respect to each of these facets of the alleged conspiracy. The defendant accordingly would not be entitled to a judgment n.o.v. with respect to the matters complained of in Grounds 13, 14, 15, 16, and 17 of its motion. The defendant's motion for judgment n.o.v. will therefore be denied in its entirety.

Turning next to the defendant's motion for new trial, 31 grounds are asserted. Grounds 1 through 3 assert a general insufficiency in the evidence to sustain the jury verdict with respect to the issue of liability. Reasserting its adoption of the summary of the evidence as stated by this Court in *Ramsey vs. United Mine Workers of America*, 265 F.Supp. 388, the Court is of the opinion that these grounds should be denied. The Court will reserve for later discussion the sufficiency of the evidence relating to the issue of damages as complained of in Ground 4 of the defendant's motion. Ground 5 complains of the failure of the Court to strike the jury panel. At the time the motion to strike the jury panel was made, the Court filed an opinion denying the motion to strike. The Court here adopts that opinion and, for the reasons therein stated, overrules Ground 5 of the defendant's motion for new trial. Grounds 6, 7, 8, 9, 10, 11, and 12 assert error on the part of the Court in admitting various items of evidence. The Court is of the opinion that in each instance complained of the evidence was properly admitted for the reasons that become apparent upon a reading of the record. Grounds 13, 14, 15, and 16 assert that error was made in submitting special issues unto the jury and in particular in submitting the special issue with regard to the interpretation of the Protective Wage Clause. The Court has previously considered these matters in connection with the defendant's motion for judgment n.o.v. and is of the opinion that no grounds for new trial are asserted in this respect. Grounds 17, 18, and 19 complain of the failure of the Court to charge the jury in accordance with certain special requests made on behalf of the defendant. A total of 50 special requests were submitted on behalf of the defendant. The defendant asserts error with regard to the failure of the Court to grant 13 of

these. The denial of these requests was discussed by the Court in the transcript at pages 3048 through 3054. In several instances the Court is of the opinion that the substance of the defendant's request was covered in the Court's charge with only specific language being denied or portions of the request being denied. Without here taking up each special request, the Court is of the opinion that a reading of the charge as given, together with a reading of the special requests, will reflect that no error was committed to the extent that the special requests were denied.

Grounds 20 through 28 complain of various matters stated in the Court's charge to the jury. Ground 20 asserts that the Court failed to properly charge the jury with regard to the burden of proof and the clear evidence rule. The Court is of the opinion that when the charge is read as a whole and isolated sentences are not taken out of context, the clear evidence rule was correctly stated. The clear evidence rule was fully explained to the jury in the charge as set forth at pages 3094 through 3098 of the transcript. Section 6 of the Norris-LaGuardia Act, upon which the rule is based, was itself read unto the jury and repeatedly throughout the charge the jury was instructed that the defendant, as a labor organization, could not be held responsible or liable for acts of officers, agents, or members except upon clear proof. Again, at the end of the charge the jury was instructed on the clear proof rule, including the instruction that

> "A labor union may not be held legally responsible for or liable for unlawful acts committed by the officers, agents, members unless it has been shown by clear proof that the union actually participated in or actually authorized such acts, or ratified them after having actual knowledge thereof."

The Clear proof rule is a rule of proof relating to the issue of the responsibility of a union for acts of its officers, members, or agents, just as stated in Section 6 of the Norris-LaGuardia Act. The jury was so instructed.

Other matters complained of in the charge, as set forth in Grounds 21 through 28 of the defendant's motion are believed to be without merit. The Court is of the opinion that a consideration of the full charge will in each instance either eliminate the basis for the complaint or demonstrate the correctness of the matters complained of.

In Ground 29 the defendant complains of an omission in the charge with regard to remote and consequential damages. The jury was repeatedly instructed that the plaintiffs, if entitled to recover, would be entitled to recover only such damages as were a direct and proximate result of the alleged Sherman Act violation. As set forth in the transcript at page 3155, the Court charged the jury:

> "Tennessee Consolidated Coal Company, if injured or damaged by the defendant's alleged violation of the antitrust laws, and Grundy Mining Company, if injured or damaged by the defendant's alleged violation of the antitrust laws, are entitled to recover only such damages as you may find to be the direct and proximate result of the wrongful acts upon the part of the defendant. Neither of the plaintiffs is entitled to recover any losses which may have been suffered as a result of general economic conditions, such as for example a decline in coal prices which did not result proximately in whole or in part from any alleged conspiracy or any violation of the antitrust laws; nor for any cause which the plaintiffs themselves are the author."

There remains for consideration only Grounds 4, 30, and 31 of the motion for new trial. Ground 4 asserts an

insufficiency of evidence to support the amount of damages awarded. Ground 30 asserts that the amount of damages was the result of speculation and guess work. Ground 31 asserts that the damages awarded were excessive.

The legal principles governing the measure of damages in cases of this nature are not in significant dispute between the parties to this lawsuit. Rather the difference lies principally in the evaluation of the evidence in regard to proximate cause and damages and in the application of the appropriate legal principles to that evidence.

Section 4 of the Clayton Act (15 U. S. C. 15) allows an award of treble damages in a civil antitrust action to "any person . . . injured in his business or property by reason of anything forbidden in the antitrust laws . . ." Thus once a violation has been established the plaintiff is entitled to recover treble the amount that would fairly compensate the plaintiff for all damages to his business or property as are shown by a preponderance of the evidence to have been proximately caused by the antitrust violation. The limitation period is four years [15 U. S. C. 15 (b)] and it is undisputed in the present case that this period would commence as of September 24, 1959, and extend through the calendar year 1963, the period between September 24, 1963, the filing date of the suit, and the end of 1963 being included without objection by amendment. While the plaintiff must establish causation of his damages by a preponderance of the evidence and the jury may not be left to speculate upon this matter, the plaintiff is not required to prove that the antitrust violation was the exclusive cause of the loss nor that it was a more substantial cause than any other. *Haverhill Gazette Co.* v. *Union*

Leader Corp., 333 F.2d 798. Likewise, while the plaintiff must establish by a preponderance of the evidence the fact of loss or damage as a result of the defendant's antitrust violation, and the fact of loss cannot be left to speculation, the circumstance that the precise amount of the plaintiff's damage may be difficult to ascertain would not deny the plaintiff the right to recover. The uncertainty which will preclude the recovery of damage is not uncertainty as to the amount of damage, but rather uncertainty as to the fact of damage and uncertainty as to whether the damage was the result of the antitrust violation. *Twentieth Century Fox Film Corp.* v. *Brookside Theatre Corp.*, 194 F.2d 846, cert. denied 343 U.S. 942.

These rules are set forth and further amplified in the cases of *Eastman Kodak Co.* v. *Southern Photo Materials Co.*, 73 U. S. 359; *Story Parchment Co.* v. *Paterson Parchment Paper Co.*, 282 U. S. 555; and *Bigelow* v. *RKO Radio Pictures, Inc.*, 327 U. S. 251, the Court in the latter case, after reviewing each of the two former cases, stating as follows:

> "In each case we held that the evidence sustained verdicts for the plaintiffs, and that in the absence of more precise proof, the jury could conclude as a matter of just and reasonable inference from the proof of defendants' wrongful acts and their tendency to injure plaintiffs' business, and from the evidence of the decline in prices, profits and values, not shown to be attributable to other causes, that defendants' wrongful acts had caused damage to the plaintiffs. In this we but followed a well settled principle. See *Hetzel* v. *Baltimore & Ohio Railway Co.*, 169 U.S. 26, 38, 39, 42 L.Ed. 648, 652, 18 S.Ct. 255. The tortious acts had in each case precluded ascertainment of the amount of damages more precisely, by comparison of profits, prices and values

as affected by the conspiracy, with what they would have been in its absence under freely competitive conditions. Nevertheless, we held that the jury could return a verdict for the plaintiffs, even though damages could not be measured with the exactness which would otherwise have been possible.

"In such a case, even where the defendant by his own wrong has prevented a more precise computation, the jury may not render a verdict based on speculation or guesswork. But the jury may make a just and reasonable estimate of the damage based on relevant data, and render its verdict accordingly. In such circumstances 'juries are allowed to act on provable and inferential as well as upon direct and positive proof.' *Story Parchment Co.* v. *Paterson Parchment Paper Co., supra,* (282 U.S. 561-564, 75 L.Ed. 690, 691, 47 S. Ct. 400). Any other rule would enable the wrongdoer to profit by his wrongdoing at the expense of his victim. It would be an inducement to make wrongdoing so effective and complete in every case as to preclude any recovery, by rendering the measure of damages uncertain. Failure to apply it would mean that the more grievous the wrong done, the less likelihood there would be of a recovery."

In the present case the plaintiffs have each sought to establish their damages on the basis of showing their operating losses and a loss of profits during the limitations period. That operating losses and loss of profits may be recovered, if shown to have been the result of an antitrust violation and if established by evidence that will permit a just and reasonable estimate of such losses based upon relevant data, is well settled. *Atlas Building Products Co.* v. *Diamond Block and Gravel Co.*, 269 F.2d 950, 958-959; *Story Parchment Company* v. *Paterson Parchment Paper Company, supra; Atlantic City Electric Company* v. *General Electric Company,* 226 F.Supp. 59, 61;

see *Volasco Products Co.* v. *Fry Roofing Co.*, 308 F.2d 383, 393, Headnote 11.

The proof of damage which the plaintiff, Tennessee Consolidated, contended that it sustained consisted of evidence of profits and losses of the Company from coal operations for each year 1951 through 1966 (Exhibit P-68). This exhibit reflected the following profits or losses for each respective year:

Year	Profit	Loss
1951	50,237	
1952		10,115
1953	45,203	
1954		4,379
1955		174,980
1956	73,801	
1957	4,185	
1958	6,219	
1959		1,069
1960		187,488
1961		337,914
1962		49,572
1963		377,328
1964	7,203	
1965	108,846	
1966	42,998	

It was the theory of the plaintiff, Tennessee Consolidated, that it was entitled to recover as damages the operating losses sustained by it for the years 1959 through 1963, plus a reasonable profit for each such year, the profit to be determined on the basis of its profit experience in representative years either prior to or subsequent to the years in suit. As reflected by Exhibit P-68, Tennessee Consolidated suffered a loss for the five-year period ending December 31, 1963, as follows:

Year	Loss
1959	1,069
1960	187,488
1961	337,914
1962	49,572
1963	377,328
Total Loss	$953,371

Although the above period includes all of 1959, whereas only three months of that year fell within the damage period, the loss that year was relatively small and the figures may accordingly be accepted without adjustment.

With regard to profits, the amount would vary depending upon the year or years accepted by the jury as most representative. It was the theory of the plaintiff that the jury should accept the average profit for the period 1951 through 1958 (excluding 1955 in which the loss of $174,980 is contended to have arisen from abnormal conditions), which sum would average $23,593 per year. As an alternative the plaintiff contended that the jury should accept the profit of $108,846 for the year 1965 as being representative. By accepting the first of these theories of damage, the jury could arrive at total damages suffered by Tennessee Consolidated in the sum of $1,053,371 (the operating loss of $953,371, plus profits of $100,000). By accepting the second of these theories of damages, the jury could arrive at total damages suffered by Tennessee Consolidated in the sum of $1,353,371 (the operating loss of $953,371, plus profits of $400,000). Thus, the maximum recovery which the jury could find on behalf of Tennessee Consolidated on the plaintiff's theory of damage would range between $1,000,000 and $1,350,000. From the verdict returned, it is apparent that the jury accepted the plaintiff's theory of damage and allowed substantially a maximum recovery under that theory.

With regard to the damages claimed on behalf of Grundy Mining Company, it is undisputed that Grundy conducted its mining operations under an agreement with Tennessee Consolidated whereby Tennessee Consolidated would reimburse all of Grundy's costs and pay Grundy five cents per ton for coal mined. Thus, any damages awarded Grundy must be deducted from those awarded unto Tennessee Consolidated, and the jury was so instructed by agreement of counsel. It was the plaintiff's theory on damages that but for the antitrust conspiracy Grundy should have been able to produce 42,654 tons per month in 1963, as it did in December of 1962, or a total of 512,208 tons. Instead, it produced only 115,953 tons that year, thereby losing $19,812.75 (396,255 tons of lost tonnage at 5¢ per ton). In 1960 it is contended that Grundy lost $4,023.28. It is thus contended that Grundy's total losses for the period were $23,836.03. From the verdict returned, it is apparent that the jury also accepted the plaintiff's theory of damages in this regard and allowed Grundy substantially a maximum recovery under that theory.

While there is evidence in the record from which the jury might have found that the Sherman Act violation of the defendant proximately caused damage unto each of the plaintiffs, the Court is of the opinion that the evidence does not support a finding that the antitrust violation was the proximate cause of all losses sustained by Tennessee Consolidated during the period 1959 through 1963. There were other factors wholly unrelated to any Sherman Act violation that must have caused a portion of the losses sustained during each of the years for which damages were allowed.

For example, in 1959 the failure of Tennessee Consolidated to achieve a productivity of 17.5 tons of coal per

man-day, as required under a T.V.A. coal sales contract, resulted in the contract being cancelled at midyear. A six-months extension of the contract was obtained by Tennessee Consolidated only by agreeing to a 20¢ per ton reduction in the price. This reduction in price resulted in a loss of $96,900 in income that the Company would otherwise have had during the last six months of the year (Tr., p. 65). There appears to be no reasonable relationship between the failure of Tennessee Consolidated to achieve productivity goals set in the T.V.A. contract and any Sherman Act violation by the defendant.

Throughout 1960 Tennessee Consolidated had no contract for the sale of coal to T.V.A., their failure to reach productivity set in the contract having resulted in its cancellation as of December 31, 1959. These matters are further discussed by the Court in its opinion in the *Ramsey* case, 365 F.Supp. 388 at p. 426. It was at this time that Tennessee Consolidated gave notice of cancellation of its collective bargaining agreement with the U.M.W. of A. and ceased coal production. Later in the year Grundy Mining Company, a wholly owned subsidiary, was organized and attempted to get into coal production, but was unable to do so due to labor conditions. While the jury might have found that a portion of the loss sustained by Tennessee Consolidated in 1960 was due to a Sherman Act violation by the defendant, it would appear entirely unreasonable to conclude that the total loss sustained was so caused. Certainly the cancellation of the T.V.A. contract for failure to achieve productivity goals was a partial factor in causing the loss. As indicated above, the failure to achieve productivity goals could not reasonably be related to a Sherman Act conspiracy in the Court's opinion. Thus, too, the reduction in T.V.A. coal purchases for the Widow's Creek Steam Plant that had occurred by

1960 must have been a contributing factor to Tennessee Consolidated's losses for that year as well as in subsequent years. Throughout this period Tennessee Consolidated's only significant market for coal had been the T.V.A. market for coal to be used at the Widow's Creek Steam Plant. Due to unfavorable cost experience at that plant in comparison with other T.V.A. steam generating plants, the T.V.A. had reduced its annual purchases of coal for the Widow's Creek Plant from 2,366,000 tons in 1956 to 1,132,000 tons by 1960. This reduction in the market for coal in the Southeastern Tennessee coal field could not be related to any Sherman Act violation. The decline in the T.V.A. coal market and the cancellation of the T.V.A. coal contract due to failure to achieve productivity goals set in the contract must have been substantial factors in causing the losses that Tennessee Consolidated sustained in 1960. In this connection the decline in T.V.A. coal purchases must likewise have adversely affected Tennessee Consolidated's income from mines leased to truck operators. The jury in setting damages could not properly ignore and disregard these factors, as it appears to have done.

In 1961 Tennessee Consolidated entered into a contract with Allen & Garcia to operate its mining property and mining was resumed upon July 10 of that year. Much of the expense incurred during 1961 must have been attributable to the re-equipping, modernizing, renovating and reopening of the mine. In the Court's opinion the jury could not properly attribute all such expense to a Sherman Act violation, as the jury did, particularly when it is considered that factors other than the Sherman Act violation must have at least contributed to the closing of the mine the year previous.

In June of 1962 a massive rock fall required the abandonment of Coal Valley Mine, then being operated for Tennessee Consolidated by Allen & Garcia. If mining was to continue, this required the opening of a new mine. Work was accordingly commenced to open a new mine at Gray's Creek No. 11. These matters must have been a significant factor in causing a substantial portion of the loss experienced by Tennessee Consolidated in 1962. Certainly the rock fall was wholly unrelated to any Sherman Act violation and the jury could not properly ignore these matters, as it appears to have done.

In the latter part of 1962 Allen & Garcia terminated its contract with Tennessee Consolidated for operation of the Gray's Creek No. 11 mine and Grundy Mining Company took over the operation. By the end of the year a strike had developed which resulted in the closing of the Grundy mining operations. Grundy did not get back into operation until October 8, 1963. These matters are more fully stated in the *Ramsey* case, 265 F.Supp. 388 at p. 428. Whether this strike and work stoppage was related to a Sherman Act violation would be an issue for the jury. However, once again, the effect of conditions cited above as being unrelated to any Sherman Act violation and as contributing substantially to losses sustained in years prior to 1963, would continue to bear some responsibility for conditions that prevailed in 1963 and could not properly be entirely ignored by the jury in assessing damages, as it appears that did in fact occur. While in an antitrust action the jury is permitted to conclude that the defendant's wrongful acts caused damage unto the plaintiffs on the basis of reasonable inferences and in the absence of precise proof, the jury cannot in doing so ignore losses shown to be attributable to other causes. As stated by the

Court in the case of *Bigelow* v. *RKO Radio Pictures, Inc.*, 327 U.S. 251 at 259:

> "In each case we held that the evidence sustained verdicts for the plaintiffs, and that in the absence of more precise proof, the jury could conclude as a matter of just and reasonable inference from the proof of defendant's wrongful acts and their tendency to injure plaintiff's business, and from the evidence of the decline in prices, profits and values, *not shown to be attributable to other causes*, that defendant's wrongful acts had caused damage to the plaintiffs." (Emphasis supplied)

Upon consideration of all of the evidence in this case with respect to the issues of proximate cause and damage, the Court is of the opinion that sufficient evidence does exist in the case to sustain a verdict for the plaintiffs on these issues, with the exception that the Court is of the opinion that the amount of damage awarded unto the plaintiff, Tennessee Consolidated Coal Company, is clearly excessive under the proof. The Court would accordingly suggest a remittitur in the sum of $500,000.00 in the amount of the verdict returned by the jury on behalf of the plaintiff, Tennessee Consolidated Coal Company. Should the plaintiff, Tennessee Consolidated Coal Company, not elect to accept the remittitur herein suggested, a new trial will be granted, the trial, however, to be limited to the issue of damage only. Except as herein stated, the Court is of the opinion that the defendant's motion for new trial should be overruled as to Grounds 4, 30 and 31.

Having now considered each ground as set forth in the defendant's motion for judgment n.o.v. and motion for new trial, the Court is of the opinion that each motion should be denied as to each plaintiff with the single exception of the remittitur suggested in regard to the

amount of damages awarded unto the plaintiff, Tennessee Consolidated Coal Company. Should the plaintiff, Tennessee Consolidated Coal Company, elect to accept the remittitur herein suggested, the defendant's motions will be denied as to each ground and with respect to each plaintiff.

The entry of an order in accordance with this opinion will await the filing within 20 days of a written notice by the plaintiff, Tennessee Consolidated Coal Company, Inc., of its election with respect to the remittitur herein suggested.

Petition for Allowance of Attorney Fees

There is also pending in this case a petition in regard to the allowance of attorney fees unto the plaintiffs. The petition in this regard requests the allowance of attorney fees in the sum of $400,000.00. In support of the petition, affidavits are filed by each of the attorneys participating in the case on behalf of the plaintiffs. The substance of these affidavits is to relate the work performed by each attorney and to summarize the amount of time devoted to the preparation and trial of the case by each attorney. The defendant has responded to the plaintiffs' petition for allowance of attorney fees by brief in which it disputes both the factual and the legal justification for the allowance of attorney fees in any sum approaching that requested. This matter was further considered at the time of the oral argument upon the defendant's motion for judgment n.o.v. and motion for new trial, and the parties at that time agreed to submit the matter unto the Court upon the petition, the affidavits of counsel and the respective briefs of the parties.

Section 15 of Title 15, U.S.C., provides for the allowance of "reasonable attorney fees" as a part of the recov-

ery due unto the injured party in an antitrust action. Upon the return of a verdict awarding damages unto the plaintiff, it is the duty of the Court to fix the amount of attorney fees upon proof made of their value, the amount to be determined by the Court in the exercise of sound discretion.

A review of the cases will reflect that the courts have considered many factors in arriving at a proper allowance for attorney fees. Among the principal factors considered by the courts are (1) the nature, extent, and difficulty of the services rendered, (2) the time spent by the plaintiff's attorneys in the preparation and trial of the case, (3) the attorney's ability, skill, and standing in the profession, including his specialized skill in the field of antitrust litigation, (4) the results accomplished by the plaintiff's attorneys in the litigation, including the amount of any recovery obtained or other benefits inuring unto the plaintiffs as a result of the services, and (5) the amounts customarily charged or allowed for similar services within the area.

These and other somewhat related factors are discussed in a number of cases. See *Volasco Products Co.* v. *Lloyd A. Fry Roofing Co.*, (C.A. 6, 1965) 346 F.2d 661; *Twentieth Century Fox Film Corp.* v. *Goldwyn*, (C.A. 9, 1964) 328 F.2d 190; *Noerr Motor Freight, Inc.* v. *Eastern R. Presidents Conference*, 166 F.Supp. 163; *Bal Theatre Corp.* v. *Paramount Film Distributing Corp.*, 206 F.Supp. 708; *Cape Cod Food Products, Inc.* v. *National Cranberry Association*, 119 F.Supp. 242; see also annotation 56 *A.L.R.* 2d 13. While reference to the specific amounts allowed or disallowed in other cases may be of some guidance to the Court, in general these matters are of relatively little value in view of the varying factual situations presented.

The trial of this case commenced upon August 1, 1967, and was completed upon August 24, 1967. A total of 18 full trial days was spent in the trial of the case. The transcript of the trial proceedings totals 3223 pages. A total of 48 witnesses testified either in person or by deposition and 97 exhibits were introduced. The pretrial proceedings involved an evidentiary hearing upon the defendant's challenge to the jury array, as well as three other appearances before the Court on pretrial motions or proceedings. A post-trial appearance was made at the argument upon the defendant's motion for judgment n.o.v. and motion for new trial and upon the plaintiff's present petition for allowance of attorney fees. Accordingly, a total of 18 days was spent in the trial of the case and all or a portion of five days have been spent in pretrial or post-trial appearances before the Court.

The plaintiffs were represented by five attorneys, each attorney having participated in the trial. The counsel bearing the major responsibility for the preparation and trial of the case was John A. Rowntree. Mr. Rowntree is a very able, distinguished, and experienced attorney. He has practiced law since 1939 and has specialized in antitrust litigation since 1955. Mr. Rowntree states that as of the filing of his affidavit upon September 18, 1967, he had spent a total of 1290 hours in work upon this case. In addition, he states that he had spent more than 9,000 hours on related litigation, including antitrust trials in the cases of *Ramsey, et al* v. *United Mine Workers, Tennessee Products & Chemical Corp.* v. *United Mine Workers* (these cases having been tried in a consolidated trial in this court), and the case of *Pennington, et al* v. *United Mine Workers* (tried in the United States District Court at Knoxville, Tennessee). While not claiming compensation in this case for the time spent in prior litigation,

these matters are cited unto the Court as being relevant to the value of Mr. Rowntree's services unto his clients in this case and as having reduced the time necessary to the preparation of this case for trial. The Court is of the opinion that any allowance of attorney fees in this case should include an allowance for the full 1290 hours spent by Mr. Rowntree.

W. D. Spears also took an active part in the trial of this case as an attorney for the plaintiffs. While the matter of Mr. Spears' legal experience is not set forth in his affidavit, the Court is aware from his frequent practice in this court that Mr. Spears is likewise a very able, distinguished, and experienced attorney having had many years of practice. Mr. Spears has participated in the trial of other antitrust litigation before this Court, but he does not specialize in this practice as does Mr. Rowntree. Mr. Spears states in his affidavit that he did not keep a record of his actual time spent on this case, but he estimates that he spent between 250 and 275 hours. The Court is of the opinion that a total of 265 hours should be considered as having been spent by Mr. Spears upon this case as of the date of the filing of his affidavit.

Judson Harwood, a licensed attorney, also participated actively in behalf of the plaintiffs in the trial of this case. Mr. Harwood's affidavit reflects that he had been a licensed attorney since 1937, but his affidavit does not otherwise set forth his practice or experience. The Court is not acquainted with Mr. Harwood other than through his participation in this litigation, but the Court is under the impression that Mr. Harwood's practice in recent years has been largely, if not wholly, devoted to serving as legal counsel for, and possibly as a corporate official of, the plaintiffs. His personal acquaintance with the affairs of

the plaintiff corporations was obviously of value to the plaintiffs in the trial of this case. In his affidavit Mr. Harwood estimates that he spent 160 hours in the trial of the case, 200 hours in the preparation of the case, and 300 hours in collateral related matters, including proceedings before the N.L.R.B. The Court is of the opinion that the time spent upon these collateral matters which are averred to be related to the present antitrust action would not properly be included within the compensable time to be allowed in the present case. *Bergian's Farm Dairy Co.* v. *Sanitary Milk Producers*, 241 F.Supp. 476; *Union Leader Corp.* v. *Newspapers of New England, Inc.*, 218 F.Supp. 490. Accordingly the Court is of the opinion that a total of 360 hours should be included for legal services rendered by Mr. Harwood in arriving at an allowance for attorney fees.

W. M. Ables, Jr., an attorney from South Pittsburg, Tennessee, actively participated in the trial of this case as an attorney for the plaintiffs. Mr. Ables has engaged in the general practice of law since 1950. He regularly practices in this court and is known to the Court as a very capable and ethical attorney. He estimates that as of the date of his affidavit he had spent from 350 to 375 hours in the preparation and trial of this case. Mr. Ables also participated in the trial in this court of the antitrust case of *Ramsey* v. *United Mine Workers, supra*, upon which case he states that he spent a total of 650 hours. None of the time spent on that case would be compensable in this case, but these matters are no doubt cited to support an increased value for Mr. Ables' services in this case. It was apparent at the trial that Mr. Ables possessed experience and knowledge acquired from participation in the former trial which rendered his services more valuable unto the plaintiffs in this litigation. The Court is of the

opinion that a total of 365 hours should be included for services rendered by Mr. Ables in assessing an allowance for attorney fees in this case.

Mr. Paul D. Kelly is a licensed attorney who engages in the general practice of law at Jasper, Tennessee. He has been engaged in the general practice of law since 1952 and is likewise known unto the Court as a capable and ethical general practitioner. He participated actively in the case, but it is the Court's recollection that he may not have been present throughout the day on each day of the trial. He states in his affidavit that he has kept no record of the actual time spent on the case, but estimates that he spent a total of 300 hours in the preparation for the trial and in the trial of the case. The Court is of the opinion that it would be proper to include an allowance for this number of hours.

In summary, it would appear proper, in setting the amount of attorney fees for this case, to consider a total of 1290 hours as having been spent by Mr. Rowntree, a total of 265 hours as having been spent by Mr. Spears, a total of 360 hours as having been spent by Mr. Harwood, a total of 365 hours as having been spent by Mr. Ables, and a total of 300 hours as having been spent by Mr. Kelly. Insofar as time is a factor, it would therefore appear that a total of 2580 hours were spent by all attorneys on behalf of the plaintiffs in this litigation. Of course, in evaluating this factor, proper consideration should be given to a difference in value of these services, taking into consideration the experience, ability, and contribution made by each respective attorney.

With regard to the difficulty and complexity of this action, it could neither be considered a "run of the mine" antitrust action, nor could it be considered to be the most

complex of such actions. It was a difficult case and its preparation required more than the usual skill for a case of this type and magnitude. Although the willingness of counsel for the defendant to stipulate with regard to exhibits and evidence and to otherwise cooperate in getting to the merits of this case greatly reduced the time and effort that might otherwise have been required to try the case, the unusual competence of defense counsel must have rendered the trial of the case always difficult from the point of view of plaintiffs' counsel.

With regard to the results accomplished on behalf of the plaintiffs, these matters would appear to speak for themselves from the record in the case, without further comment from the Court.

As to charges customarily made or allowed for similar services within this area, there is not a great deal upon which the Court has to rely insofar as antitrust litigation is specifically concerned. The parties have filed as an exhibit the schedule of minimum fees established by the Chattanooga Bar Association in 1965. This schedule reflects a minimum fee of $25.00 per hour for office work and a minimum per diem of $300.00 per day for court appearance in federal court. While overhead costs of attorneys have no doubt risen both substantially and rapidly in recent years, and while the overhead costs of various counsel may substantially differ, this schedule of rates does constitute a helpful guide.

Allowing per diem compensation in accordance with the minimum fee schedule and allowing an hourly rate of from $25.00 to $50.00 per hour, varying with the experience and contribution of respective counsel for the plaintiffs, and, considering these factors only, the Court would arrive at attorney fees totaling $106,900.00. When

other appropriate factors, as outlined above, are taken into consideration, the Court is of the opinion that an award of attorney fees in the sum of $150,000 would be reasonable and proper. An allowance will be made accordingly.

FRANK W. WILSON
United States District Judge

Filed May 8, 1968

FINAL JUDGMENT

This cause came on to be heard before the Honorable Frank W. Wilson, Judge, and a jury of good and lawful men and women, to-wit:

(Clerk here copy names)

who were duly elected, empaneled and sworn to well and truly try the issues joined between the plaintiffs, Tennessee Consolidated Coal Company and Grundy Mining Company, and the defendant United Mine Workers of America, and who, having heard the opening statements of counsel, the evidence produced in open court, the argument of counsel and the charge of the court as to the law, retired on August 23, 1967 for consideration of the special issues and the issues set forth in the general verdict form submitted to them by the court, and thereafter were respited to the following day, and after further consideration and deliberation returned into court and did say upon their oaths with respect to the special issues as follows:

(1) We, the jury, find that the United Mine Workers of America did so act as to forfeit its exemption under the antitrust laws.

(2) We, the jury, find that prior to and apart from the National Bituminous Coal Wage Agreement as amended in 1958, the defendant United Mine Workers of America did not conspire, combine or contract with the coal operators who signed the National Agreement that it would contract with non-signatory operators only upon the terms and conditions of the National Bituminous Coal Wage Agreement as amended from time to time.

(3) We, the jury, find that the United Mine Workers of America and signatories of the National Bituminous Coal Wage Agreement as amended in 1958 did intend that by the terms of the Protective Wage Clause the United Mine Workers of America agreed that it would contract with non-signatory operators only upon the terms and conditions of the National Bituminous Coal Wage Agreement as amended from time to time.

And thereupon, the jury did say upon their oaths with respect to the issues set forth in the general verdict form as follows:

(1) We, the jury, find that the United Mine Workers of America did engage in a conspiracy, as alleged by the plaintiffs, to unreasonably restrain trade or to monopolize commerce in the bituminous coal industry outside or beyond the exemption granted by the antitrust statutes to a labor organization and in violation of Section 1 or Section 2 of the Sherman Antitrust Act.

(2) We, the jury, find that the plaintiff, Tennessee Consolidated Coal Company was damaged in its business or property as a proximate result of defendant's violation of the Sherman Act.

(3) We assess damages for Tennessee Consolidated Coal Company in the following amount: $977,500.00.

(4) We, the jury, find that the plaintiff, Grundy

Mining Company, was damaged in its business or property as a proximate result of defendant's violation of the Sherman Act.

(5) We assess damages for Grundy Mining Company in the following amount: $22,500.00.

Thereupon the defendant, United Mine Workers of America, duly filed its Motion for Judgment in Accordance with Motions for Directed Verdict, or in the Alternative, Motion for a New Trial, and plaintiffs filed their Petition for Allowance of Attorneys' Fees with affidavits of counsel attached. This cause then came on to be heard by the Court upon said motions and petition and the affidavits, briefs and oral argument by counsel.

For the reasons set forth in the Opinion of the Court filed April 23, 1968, reference to which is here made, the Court concluded that the motions filed by the defendant should be overruled except that the damages awarded by the jury were excessive, and the Court suggested a remittitur of Five Hundred Thousand Dollars ($500,000.00) in the damages awarded the plaintiff Tennessee Consolidated Coal Company; and the Court concluded that if the said plaintiff should accept the said remittitur, the motions of the defendant should be overruled, otherwise a new trial should be granted upon the issue of damages alone. As set forth in said opinion, the Court further concluded in response to the petition filed by plaintiffs that the plaintiffs should recover from the defendant attorneys fees in the amount of One Hundred Fifty Thousand Dollars ($150,000.00).

Thereupon the plaintiffs duly filed their acceptance of the remittitur suggested by the Court.

ACCORDINGLY IT IS ORDERED That, with the accepted remittitur, the Motion for Judgment in Accord-

ance with Motions for Directed Verdict, or in the Alternative, Motion for a New Trial filed by defendant be, and the same hereby is, overruled. The Petition for Allowance of Attorneys Fees filed by plaintiffs is granted in the amount of One Hundred Fifty Thousand Dollars ($150,000.00).

WHEREFORE, IT IS ORDERED AND ADJUDGED That the plaintiff, Tennessee Consolidated Coal Company, have and recover of the defendant, United Mine Workers of America, the sum of One Million Four Hundred Thirty-Two Thousand Five Hundred Dollars ($1,432,500.00), and the plaintiff, Grundy Mining Company, have and recover of the said defendant the sum of Sixty Seven Thousand Five Hundred Dollars ($67,500.00), being three times the amount of damages sustained by said plaintiffs, together with the sum of One Hundred Fifty Thousand Dollars ($150,000.00), being reasonable attorneys' fees awarded and assessed by the Court in favor of the plaintiffs, said attorneys' fees being divided between said plaintiffs in proportion to the respective amounts of the damages awarded, or One Hundred Forty Three Thousand Two Hundred Fifty Dollars ($143,250.00) to Tennessee Consolidated Coal Company, and Six Thousand Seven Hundred Fifty Dollars ($6,750.00) to Grundy Mining Company, a total of One Million Five Hundred and Seventy Five Thousand Seven Hundred and Fifty Dollars ($1,575,750.00) to Tennessee Consolidated Coal Company and a total of Seventy Four Thousand Two Hundred and Fifty Dollars ($74,250.00) to Grundy Mining Company.

IT IS ALSO ORDERED AND ADJUDGED that said plaintiffs have and recover of the said defendant their costs to be taxed.

Execution will issue in favor of the said plaintiffs and against said defendant in the total sums of said judgments and costs.

ENTER:

FRANK W. WILSON
United States District Judge

APPENDIX C

15 USCA:

§ 1. TRUSTS, ETC., IN RESTRAINT OF TRADE ILLEGAL; EXCEPTION OF RESALE PRICE AGREEMENTS; PENALTY

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal: *Provided,* That nothing contained in sections 1-7 of this title shall render illegal, contracts or agreements prescribing minimum prices for the resale of a commodity which bears, or the label or container of which bears, the trademark, brand, or name of the producer or distributor of such commodity and which is in free and open competition with commodities of the same general class produced or distributed by others, when contracts or agreements of that description are lawful as applied to intrastate transactions, under any statute, law, or public policy now or hereafter in effect in any State, Territory, or the District of Columbia in which such resale is to be made, or to which the commodity is to be transported for such resale, and the making of such contracts or agreements shall not be an unfair method of competition under section 45 of this title: *Provided further,* That the preceding proviso shall not make lawful any contract or agreement, providing for the establishment or maintenance of minimum resale prices on any commodity herein involved, between manufacturers, or between producers, or between wholesalers, or between brokers, or between factors, or between retailers, or between persons, firms, or corporations in competition with each other. Every person who shall make any contract or engage in any combination or conspiracy declared by section 1-7 of this title to be illegal shall be deemed guilty of a misdemeanor, and, on conviction

thereof, shall be punished by fine not exceeding fifty thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the Court. July 2, 1890, c. 647, § 1, 26 Stat. 209; Aug. 17, 1937, c. 690, Title VIII, 50 Stat. 693, July 7, 1955. c. 281, 69 Stat. 282.

§ 2. MONOPOLIZING TRADE A MISDEMEANOR; PENALTY

Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding fifty thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court. July 2, 1890, c. 647, § 2, 26 Stat. 209; July 7, 1955, c. 281, 69 Stat. 282.

* * *

§ 15. SUITS BY PERSONS INJURED; AMOUNT OF RECOVERY

Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee. Oct. 15, 1914, c. 323, § 4, 38 Stat. 731.

* * *

§ 17. ANTITRUST LAWS NOT APPLICABLE TO LABOR ORGANIZATIONS

The labor of a human being is not a commodity or

article of commerce. Nothing contained in the antitrust laws shall be construed to forbid the existence and operation of labor, agricultural, or horticultural organizations, instituted for the purposes of mutual help, and not having capital stock or conducted for profit, or to forbid or restrain individual members of such organizations from lawfully carrying out the legitimate objects thereof; nor shall such organizations, or the members thereof, be held or construed to be illegal combinations or conspiracies in restraint of trade, under the antitrust laws. Oct. 15, 1914, c. 323, § 6, 38 Stat. 731.

TITLE 28 USCA

§1861. ***Qualifications of Federal jurors***

Any citizen of the United States who has attained the age of twenty-one years and who has resided for a period of one year within the judicial district, is competent to serve as a grand or petit juror unless—

(1) He has been convicted in a State or Federal court of record of a crime punishable by imprisonment for more than one year and his civil rights have not been restored by pardon or amnesty.

(2) He is unable to read, write, speak, and understand the English language.

(3) He is incapable, by reason of mental or physical infirmities to render efficient jury service.

* * * *

§1862. ***Exemptions***

The following persons shall be exempt from jury service:

(1) Members in active service in the armed forces of the United States.

(2) Members of the Fire or Police departments of any State, District, Territory, Possession or subdivision thereof.

(3) Public officers in the executive, legislative or judicial branches of the government of the United States, or any State, District, Territory, or Possession or subdivision thereof who are actively engaged in the performance of official duties.

* * * *

§1863. ***Exclusion or excuse from service***

(a) A district judge for good cause may excuse or exclude from jury service any person called as a juror.

(b) Any class or group or persons may, for the public interest, be excluded from the jury panel or excused from service as jurors by order of the district judge based on a finding that such jury service would entail undue hardship, extreme inconvenience or serious obstruction or delay in the fair and impartial administration of justice.

(c) No citizen shall be excluded from service as grand or petit juror in any court of the United States on account of race or color.

* * * *

§1864. ***Manner of drawing; jury commissioners and their compensation***

The names of grand and petit jurors shall be publicly drawn from a box containing the names of not less than three hundred qualified persons at the time of each drawing.

The jury box shall from time to time be refilled by the clerk of the court, or his deputy, and a jury commissioner, appointed by the court.

Such jury commissioner shall be a citizen of good standing, residing in the district and a well known member of the principal political party in the district, opposing that to which the clerk, or his deputy then acting, may belong. He shall receive $5 per day for each day necessarily employed in the performance of his duties.

The jury commissioner and the clerk, or his deputy, shall alternately place one name in the jury box without reference to party affiliations, until the box shall contain at least 300 names or such larger number as the court determines.

This section shall not apply to the District of Columbia.

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29 USCA Sec. 52 (Sec. 20 of the Clayton Act):

§ 52. STATUTORY RESTRICTION OF INJUNCTIVE RELIEF

No restraining order or injunction shall be granted by any court of the United States, or a judge or the judges thereof, in any case between an employer and employees, or between employers and employees, or between employees, or between persons employed and persons seeking employment, involving, or growing out of, a dispute concerning terms or conditions of employment, unless necessary to prevent irreparable injury to property, or to a property right, of the party making the application, for which injury there is no adequate remedy at law, and such property or property right must be described with particularity in the application, which must be in writing and sworn to by the applicant or by his agent or attorney.

And no such restraining order or injunction shall prohibit any person or persons, whether singly or in concert,

from terminating any relation of employment, or from ceasing to perform any work or labor, or from recommending, advising, or persuading others by peaceful means so to do; or from attending at any place where any such person or persons may lawfully be, for the purpose of peacefully obtaining or communicating information, or from peacefully persuading any person to work or to abstain from working; or from ceasing to patronize or to employ any party to such dispute, or from recommending, advising, or persuading others by peaceful and lawful means so to do; or from paying or giving to, or withholding from, any person engaged in such dispute, any strike benefits or other moneys or things of value; or from peaceably assembling in a lawful manner, and for lawful purposes; or from doing any act or thing which might lawfully be done in the absence of such dispute by any party thereto; nor shall any of the acts specified in this paragraph be considered or held to be violations of any law of the United States. Oct. 15, 1914, c. 323, § 20, 38 Stat. 738.

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29 USCA Sec. 102 (Sec. 2 of the Norris-LaGuardia Act):

§ 102. PUBLIC POLICY IN LABOR MATTERS DECLARED

In the interpretation of this chapter and in determining the jurisdiction and authority of the courts of the United States, as such jurisdiction and authority are defined and limited in this chapter, the public policy of the United States is declared as follows:

Whereas under prevailing economic conditions, developed with the aid of governmental authority for owners of property to organize in the corporate and other forms of ownership association, the individual unorganized worker is commonly helpless to exercise actual liberty

of contract and to protect his freedom of labor, and thereby to obtain acceptable terms and conditions of employment, wherefore, though he should be free to decline to associate with his fellows, it is necessary that he have full freedom of association, self-organization, and designation of representatives of his own choosing, to negotiate the terms and conditions of his employment, and that he shall be free from the interference, restraint, or coercion of employers of labor, or their agents, in the designation of such representatives or in self-organization or in other concerted activities for the purpose of collective bargaining or other mutual aid or protection; therefore, the following definitions of and limitations upon the jurisdiction and authority of the courts of the United States are enacted. Mar. 23, 1932, c. 90, § 2, 47 Stat. 70.

* * *

29 USCA Sec. 104 (Sec. 4 of the Norris-LaGuardia Act):

§ 104. ENUMERATION OF SPECIFIC ACTS NOT SUBJECT TO RESTRAINING ORDERS OR INJUNCTIONS

No court of the United States shall have jurisdiction to issue any restraining order or temporary or permanent injunction in any case involving or growing out of any labor dispute to prohibit any person or persons participating or interested in such dispute (as these terms are herein defined) from doing, whether singly or in concert, any of the following acts:

(a) Ceasing or refusing to perform any work or to remain in any relation of employment;

(b) Becoming or remaining a member of any labor organization or of any employer organization, regardless of any such undertaking or promise as is described in section 103 of this title;

(c) Paying or giving to, or withholding from, any person participating or interested in such labor dispute, any strike or unemployment benefits or insurance, or other moneys or things of value;

(d) By all lawful means aiding any person participating or interested in any labor dispute who is being proceeded against in, or is prosecuting, any action or suit in any court of the United States or of any State;

(e) Giving publicity to the existence of, or the facts involved in, any labor dispute, whether by advertising, speaking, patrolling, or by any other method not involving fraud or violence;

(f) Assembling peaceably to act or to organize to act in promotion of their interests in a labor dispute;

(g) Advising or notifying any person of an intention to do any of the acts heretofore specified;

(h) Agreeing with other persons to do or not to do any of the acts heretofore specified; and

(i) Advising, urging, or otherwise causing or inducing without fraud or violence the acts heretofore specified, regardless of any such undertaking or promise as is described in section 103 of this title. Mar. 23, 1932, c. 90, § 4, 47 Stat. 70.

* * *

29 USCA Sec. 106 (Sec. 6 of the Norris-LaGuardia Act):

§ 106. RESPONSIBILITY OF OFFICERS AND MEMBERS OF ASSOCIATIONS OR THEIR ORGANIZATIONS FOR UNLAWFUL ACTS OF INDIVIDUAL OFFICERS, MEMBERS, AND AGENTS

No officer or member of any association or organization, and no association or organization participating or

interested in a labor dispute, shall be held responsible or liable in any court of the United States for the unlawful acts of individual officers, members, or agents, except upon clear proof of actual participation in, or actual authorization of, such acts or of ratification of such acts after actual knowledge thereof. Mar. 23, 1932, c. 90, § 6, 47 Stat. 71.

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29 USCA Sec. 141 (Sec. 1, Labor Management Relations Act, 1947):

§ 141. SHORT TITLE; CONGRESSIONAL DECLARATION OF PURPOSE AND POLICY

(a) This chapter may be cited as the "Labor Management Relations Act, 1947".

(b) Industrial strife which interferes with the normal flow of commerce and with the full production of articles and commodities for commerce, can be avoided or substantially minimized if employers, employees, and labor organizations each recognize under law one another's legitimate rights in their relations with each other, and above all recognize under law that neither party has any right in its relations with any other to engage in acts or practices which jeopardize the public health, safety, or interest.

It is the purpose and policy of this chapter, in order to promote the full flow of commerce, to prescribe the legitimate rights of both employees and employers in their relations affecting commerce, to provide orderly and peaceful procedures for preventing the interference by either with the legitimate rights of the other, to protect the rights of individual employees in their relations with

labor organizations whose activities affect commerce, to define and proscribe practices on the part of labor and management which affect commerce and are inimical to the general welfare; and to protect the rights of the public in connection with labor disputes affecting commerce. June 23, 1947, c. 120, § 1, 61 Stat. 136.

* * *

29 USCA Sec. 151 (Sec. 1, National Labor Relations Act, as Amended):

§ 151. FINDINGS AND DECLARATION OF POLICY

The denial by some employers of the right of employees to organize and the refusal by some employers to accept the procedure of collective bargaining lead to strikes and other forms of industrial strife or unrest, which have the intent or the necessary effect of burdening or obstructing commerce by (a) impairing the efficiency, safety, or operation of the instrumentalities of commerce; (b) occurring in the current of commerce; (c) materially affecting, restraining, or controlling the flow of raw materials or manufactured or processed goods from or into the channels of commerce, or the prices of such materials or goods in commerce; or (d) causing diminution of employment and wages in such volume as substantially to impair or disrupt the market for goods flowing from or into the channels of commerce.

The inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contract, and employers who are organized in the corporate or other forms of ownership association substantially burdens and affects the flow of commerce, and tends to aggravate recurrent business depressions, by depressing wage rates and the purchasing power of wage

earners in industry and by preventing the stabilization of competitive wage rates and working conditions within and between industries.

Experience has proved that protection by law of the right of employees to organize and bargain collectively safeguards commerce from injury, impairment, or interruption, and promotes the flow of commerce by removing certain recognized sources of industrial strife and unrest, by encouraging practices fundamental to the friendly adjustment of industrial disputes arising out of differences as to wages, hours, or other working conditions, and by restoring equality of bargaining power between employers and employees.

Experience has further demonstrated that certain practices by some labor organizations, their officers, and members have the intent or the necessary effect of burdening or obstructing commerce by preventing the free flow of goods in such commerce through strikes and other forms of industrial unrest or through concerted activities which impair the interest of the public in the free flow of such commerce. The elimination of such practices is a necessary condition to the assurance of the rights herein guaranteed.

It is declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection. July 5, 1935, c.

372, § 1, 49 Stat. 449; June 23, 1947, c. 120, Title I, § 101, 61 Stat. 136.

* * *

29 USCA Sec. 157 (Sec. 7, National Labor Relations Act, as Amended):

§ 157. RIGHT OF EMPLOYEES AS TO ORGANIZATION, COLLECTIVE BARGAINING, ETC.

Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158(a) (3) of this title. July 5, 1935, c. 372, §7, 49 Stat. 452; June 23, 1947, c. 120, Title I, §101, 61 Stat. 140.

Rule 49(b), Federal Rules of Civil Procedure:

(b) General Verdict Accompanied by Answer to Interrogatories. The court may submit to the jury, together with appropriate forms for a general verdict, written interrogatories upon one or more issues of fact the decision of which is necessary to a verdict. The court shall give such explanation or instruction as may be necessary to enable the jury both to make answers to the interrogatories and to render a general verdict, and the court shall direct the jury both to make written answers and to render a general verdict. When the general verdict and the answers are harmonious, the appro-

priate judgment upon the verdict and answers shall be entered pursuant to Rule 58. When the answers are consistent with each other but one or more is inconsistent with the general verdict, judgment may be entered pursuant to Rule 58 in accordance with the answers, notwithstanding the general verdict, or the court may return the jury for further consideration of its answers and verdict or may order a new trial. When the answers are inconsistent with each other and one or more is likewise inconsistent with the general verdict, judgment shall not be entered, but the court shall return the jury for further consideration of its answers and verdict or shall order a new trial.

As amended Jan. 21, 1963, eff. July 1, 1963.

CONSTITUTION OF THE UNITED STATES

Amendment VII

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.

APPENDIX D

PROTECTIVE WAGE CLAUSE

The United Mine Workers (which, as used in this Clause, includes all of its Districts, Local Unions, Officers or Agents) and the Operators signatory hereto affirm their intention to maintain the integrity of this contract in all of its parts. The objective of this contract is to provide the maximum possible continuity and stability of employment under the conditions set forth herein. The parties hereto agree that bituminous coal mines shall be so operated as not to debase or lower the standards of wages, hours, safety requirements and other conditions of work, established by this contract. The parties recognizing their obligation each as to the other to exercise ~~all~~ possible efforts and means to attain these objectives further agree as follows:

A. During the period of this Contract, the United Mine Workers of America will not enter into, be a party to, nor will it permit any agreement or understanding covering any wages, hours or other conditions of work applicable to employees covered by this Contract on any basis other than those specified in this Contract or any applicable District Contract. The United Mine Workers of America will diligently perform and enforce without discrimination or favor the conditions of this paragraph and all other terms and conditions of this Contract and will use and exercise its continuing best efforts to obtain full compliance therewith by each and all the parties signatory thereto.

B. It is recognized that when signatory operators mine, prepare, or procure or acquire under subcontract arrangements, bituminous coal mined under terms and conditions less favorable than those provided for in this contract, they deprive employees of

employment opportunities, employment conditions and other benefits which these employees are entitled to have safeguarded, stabilized and protected. Accordingly, the Operators agree that all bituminous coal mined, produced, or prepared by them, or any of them, or procured or acquired by them or any of them under a subcontract arrangement, shall be or shall have been mined or produced under terms and conditions which are as favorable to the employees as those provided for in this Contract.

"Procured or acquired a subcontract arrangement" means any contract, lease, license, agreement, arrangement or understanding pursuant to which the signatory operator acquires coal, either as principal or agent, directly or indirectly from a producer other than such signatory for delivery to a person other than such signatory.

The obligation assumed hereunder shall not affect any agreement in effect as of the date of execution of this contract: Provided, however, that any operator signatory hereto who is a party to any agreement inconsistent with the obligations assumed hereunder shall not maintain such inconsistent agreement in effect beyond the first date at which such agreement may be terminated by him in accordance with its terms.

The Operators signatory to this agreement shall so conduct their own operations (whether operated directly or indirectly, or through subsidiaries or affiliates) so as to fully comply with their obligations under this Clause. The obligation of each Operator signatory hereto, which is several and not joint, to fully perform all the conditions in this paragraph B contained, shall be a direct and continuing obligation of said Operator during the life of this Agreement.

As a part of the consideration for this Agreement, the Operators signatory hereto agree that this Clause covers the operation of all the coal lands, coal pro-

ducing or coal preparation facilities owned or held under lease by them, or any of them, or by any subsidiary or affiliate at the date of this Agreement, or acquired during its term which may hereafter (during the term of this Agreement) be put into production or use. The said Operators agree that they will not lease, license, or contract out any coal lands, coal producing or coal preparation facilities as a subterfuge for the purpose of avoiding the application of this Clause.

C. There is hereby established a Joint Industry Contract Committee composed of six (6) members, three (3) of whom shall be appointed and may be removed by the Union and three (3) of whom shall be appointed and may be removed by the Operators. Such appointments shall be made and notice thereof given to the proper parties hereto as expeditiously as possible and not later than thirty (30) days after the date of the execution of this Contract. In the event of resignation, removal, death, inability or unwillingness to serve of any of the members of the Committee, the Union shall appoint the successor or successors of the members originally appointed by it and the Operators shall appoint the successor or successors of the members originally appointed by them. Action which may be required of the Operators for the appointment of any member of the Joint Industry Contract Committee representing them may be taken by those Operators who, at the time, are signatories hereto. Authorization, approval or ratification of Operators representing fifty-one (51) per cent or more of the coal produced for use or sale during the calendar year previous to that in which such action is taken shall be sufficient to bind all Operators.

The Joint Industry Contract Committee may appoint such Joint District Contract Committees in such districts or groups of districts as it may determine, such district committees to consist of such

numbers of members, half of whom shall represent the Union and half of whom shall represent the Operators in that district or groups of districts, as the Industry Committee shall deem advisable. The Joint District Contract Committees shall assist the Joint Industry Contract Committee in making any investigations hereunder.

The Joint Industry Contract Committee and the Joint District Committees, when authorized by and under the supervision of the Industry Committee, may employ such clerical and other employees as are required for the performance of their duties hereunder. Expenses of all Committees shall be borne equally by the Union and the Operators.

D. Within one hundred and twenty days after the execution of this contract and each six months thereafter each Operator signatory hereto shall certify in writing to the Joint District Contract Committee for the District where he maintains his principal place of business where such a District Committee exists, or to the Joint Industry Contract Committee where no District Committee exists, that bears in full compliance with all the terms and conditions of this contract or any applicable District Agreement. Within one hundred and twenty days after the execution of this Agreement, and each six months thereafter each Union District President shall certify in writing to his Joint District Contract Committee, if one exists, or, if none exists, to the Joint Industry Contract Committee, a complete list of all Operators and Mines engaged in the production of bituminous coal within his district whose operations are under contract with the Union. No operator may be found to be in violation of this Protective Wage Clause with respect to any coal produced by another operator who is listed on the Contract list to be furnished by United Mine Workers of America under this paragraph, unless and until such operator is notified in writing by the

Joint Industry Contract Committee that such operator has failed to comply with the provisions of this Clause and such failure has not been corrected.

E. Any party signatory to this contract shall have the right at any time to file a complaint with the Joint Industry Contract Committee alleging a violation of any provision of this Protective Wage Clause. In the event such a charge is filed it shall be the duty of the Joint Industry Contract Committee to investigate and determine the facts with respect to such alleged violation. Any determination by the Joint Industry Committee that a violation of this Clause has occurred may be made only upon the concurrence therein of a majority of the membership of the Committee. Notice by the Committee to the affected party, opportunity for the party to be heard, and failure promptly to effect full compliance after a finding of violation by the Committee shall be deemed a condition precedent to any final determination that a violation of this Clause has occurred. Findings made by the Joint Committee, after notice and opportunity for hearing, shall be served upon all parties to the proceeding, and shall constitute a final determination as to the fact of a violation. Failure or refusal of United Mine Workers or any Operator signatory hereto to comply with a final determination by the Committee of a violation of Paragraphs (A) or (B) of this Clause may be deemed a violation of this Agreement.

The Mine Workers agree to make available to the Joint Industry Contract Committee all contracts, agreements, or understandings entered into by the Mine Workers with any person engaged in the production of bituminous coal, and further agree to appear before the Committee on request by it and inform the Committee on such other related and pertinent matters as shall be essential to the Committee's investigation of an alleged violation of this Protective Wage Clause. Each Operator signatory

hereto agrees to appear before the Committee on request by it and inform the Committee as to the source and quantity of coal produced or purchased or otherwise acquired, payment of wages to, and hours and working conditions of classified employees, payments to the United Mine Workers of America Welfare and Retirement Fund, and such other related and pertinent matters as shall be essential to the Committee's investigation of an alleged violation of this Protective Wage Clause.

The authority of the Committee is restricted to the subject matter covered in this Protective Wage Clause and shall not extend to disputes concerning the administration of the Contract which are of the type that have heretofore been processed under the grievance procedures provided for in the Section of the Contract entitled "Settlement of Local and District Disputes"; nor shall the provisions of this "Protective Wage Clause" be subject to the terms or conditions of the "Settlement of Local and District Disputes" section of this Contract.

APPENDIX E

Filed August 24, 1967

District Court Opinion—In re Motion of United Mine Workers of America to Strike the Jury Panel

This case is before the Court upon the motion of the defendant, United Mine Workers of America, to strike the jury panel. The motion sets forth various grounds upon which it is contended that the jury panel from which a trial jury will be selected was improperly and unlawfully selected, drawn and impaneled. Included within the motion to strike was a motion to be allowed to take the discovery depositions of the members of the jury commission, Karl D. Sauplaw, the clerk of this court, and Ray William Evans, the public member of the commission. An order has heretofore entered allowing the discovery examination of the jury commission members and the depositions of these two officials, together with the exhibits filed therewith, constitute the record upon which the motion to strike the jury panel has now been submitted.

Considering the motion to strike in the order of the grounds stated therein, it is first contended that the manner in which the jury list was compiled did not meet the requirements of Title 28, U.S.C. 1864. No evidence has been submitted in support of this allegation. On the contrary, it affirmatively appears that the jury list from which a trial jury is scheduled to be selected in this cause was in all respects compiled and selected in the manner provided in 28 U.S.C. 1864. All names appearing on the list were alternately placed in the jury box by the clerk of this court and the duly appointed jury commissioner. Thereafter, and at a time when the jury box contained in excess of 300 names, the jury list now

sought to be stricken was drawn, each commissioner drawing a name alternately, from the jury box at a public drawing in accordance with the order of the Court directing that the panel be drawn. Upon March 21, 1967, at a time when the jury box contained 445 names, the names of 30 grand jurors and 100 petit jurors were drawn from the box. Thereafter on June 20, 1967, and while the jury box contained 315 names, the names of an additional 20 petit jurors were drawn. The present panel of petit jurors here sought to be striken is composed of 120 petit jurors as drawn upon these two dates. As stated, the record is undisputed that they were drawn in accordance with 28 U.S.C. 1864. The first ground of the defendant's motion will accordingly be denied.

The second ground of the defendant's motion avers that the names of the jury panel were not publicly drawn and were not drawn at a time when the jury box contained the names of at least 300 qualified jurors. These are matters included within the discussion of the first ground of the motion and, as stated above, there is no evidence submitted in support of these contentions. On the contrary, the evidence is undisputed that the names were publicly drawn and were drawn at a time when the jury box contained in excess of 300 names. The second ground of the defendant's motion will accordingly be denied.

The third ground in the defendant's motion avers that the system employed by the jury commissioners in selecting names to be placed in the jury box is unlawful in that it consistently results in a jury list made up of a disproportionately large number of businessmen, supervisory and management employees, and a disproportionately small number of wage earners and labor union members. It is the essence of the defendant's con-

tention in this regard, first, that each jury commissioner obtain a majority of all names placed in the jury box from suggesters, which suggesters failed to include anyone who might be classified as a laborer or labor union official; and, second, that a canvass of the occupations as listed upon the occupation of all jury questionnaires for names placed in the jury box since November of 1965 (the date when the present jury commissioners assumed their duties) reflect that only 10 to 20% of the names could be classified as wage earners, with the remaining drawn from business, professional groups, and farmers. It is contended that census statistics for the counties comprising this judicial district and division reflect that wage earners comprise from 66 to 80% of the working population.

Considering first the defendant's contention with regard to an elleged statistical imbalance in regard to wage earners, it appears unto the Court that the evidence in this regard would not support the motion to strike and this for several reasons. In the first place, the statistics cited by the defendant are themselves subject to question as to their meaning and usefulness. The census figures in each instance reflect ratios between various economic groups, as for example between wage earners and salaried personnel or the employees and executives. Juries are not drawn, however, from these categories only, but rather from the entire adult citizenship. So that the meaningful ratios would accordingly be between an economic group and the total adult population, rather than between one economic group and another economic group. Although the questionnaires, in most instances, reflect an occupation, the responses given often do not permit any accurate classification and a large element of judgment enters as to whether the juror should or

should not be classified as a wage earner, a salaried person, or a management person. The jury commissioners made an analysis of the present jury panel and arrived at the conclusion that of the 120 names in the panel, 51 should be classified as laborers, 35 to 40 should be classified as housewives, salesmen, unemployed and others, and 35 should be classified as business or management, the latter, however, including engineers and salaried people not necessarily performing management duties. The Court itself reviewed the questionnaires of the present panel and has made a summary of all occupations listed thereon. This summary is attached as Appendix A to this opinion. The Court has likewise made a survey of all questionnaires upon the names originally in the jury box and summarized all occupations listed thereon. This summary is attached as Appendix B to this opinion. A review of these summaries reflects a very wide assortment of occupations. The Court can only conclude that it does not reflect any pattern of discrimination against or any pattern favoring any occupational or economic group.

It is of course well settled that a statistical correspondence between the composition of any particular jury panel and the total population is not required. Such balance would in fact be impossible of attainment, for when a few hundred names are to be placed in the jury box from a total population running in the hundreds of thousands, it is apparent that representatives of every characteristic of the total population is not possible in so relatively small a number. What is required is that no cognizable element of the qualified citizenry be deliberately or intentionally excluded from the jury list. *Fay* v. *New York*, 332 U.S. 261, 91 L.ed. 2043, 67 S.Ct. 1613, reh. den. 382 U.S. 784; *Thiel* v. *Southern Pacific*

Company, 328 U.S. 217, 90 L.ed. 1181, 66 S.Ct. 984. As stated in *Thiel* v. *Southern Pacific Company, supra:*

> "The American tradition of trial by a jury, considered in connection with either criminal or civil proceedings, necessarily contemplates an impartial jury drawn from a cross section of the community. (Citations omitted) This does not mean, of course, that every jury must contain representatives of all economic, social, religious, racial, political and geographical groups of the community. Frequently such complete representation would be impossible, but it does mean that prospective jurors shall be selected by court officials without systematic and intentional exclusion of any of these groups."

Turning the attention of the Court next to the defendant's contention that the system followed by the jury commissioners in obtaining prospective jurors' names by consulting suggesters was itself discriminatory in that no laborers nor union representatives were included within such suggesters, the Court is of the opinion that the defendant's contention in this regard is without merit. In the first place, there is no requirement that suggesters themselves be a cross section of the community, although in this case there does appear to be a substantial diversity among the suggesters consulted. What is required, however, is that the names placed in the jury box by the jury commissioners, from whatever source obtained, reflect a fair cross section of the qualified citizenry residing in the district and that no eligible group be intentionally or systematically excluded. It is the jury commissioners themselves who have the responsibility for achieving this result. They have a right and a duty to exercise selectivity in placing names in the jury box in order to achieve this result. The Court is of the opinion that the evidence presented in behalf

of the present motion does not reflect any systematic or intentional exclusion of any cognizable group of eligible citizenry. On the contrary, the evidence reflects that the present panel was drawn from the jury box at a time when a reasonable and fair cross section of the community was represented among the names within the box.

The remaining objections in the defendant's motion relate to alleged errors on the part of the jury commissioners in rejecting names of potential jurors for reasons not set forth in the relevant statutes as grounds for jury disqualification. It is the defendant's contention in this regard that the jury commissioners are without authority to exercise any personal judgment with respect to a juror's qualifications and the defendant relies upon *Rabinowitz* v. *United States,* (C.C.A. 5, 1966) 366 F.2d 34, as authority for their position in this regard. As reflected by the concurring opinion and the two dissenting opinions in the case, *Rabinowitz* is not without criticism upon the issue for which it is here cited. Obviously if the jury commissioners are to perform their duty of obtaining a fair cross section of the community, they must exercise some discretion in placing names in the jury box and are not required to place every name in the box provided by a suggester or from whom questionnaires may have been obtained. In most cases the questionnaires rejected by the commissioners have reflected medical or physical reasons for their rejection. In any event, they reflect no pattern of discrimination.

Although the record reflects in this case a conscientious effort upon the part of the jury commissioners to perform their duties with fidelity, and, as stated, the Court is of the opinion that no ground exists for striking the present panel, there are matters reflected in the record which deserve the comment of the Court with a

view to improvement of the practices and procedures followed by the commissioners. In the first place, to the extent that either commissioner is to use suggesters to obtain the names of potential jurors, a continuing effort should be made to enlarge the number of suggesters and to improve the geographical, social, economical, racial and religious balance among the suggesters. The record reflects that neither commissioner relies wholly upon suggesters as a method of obtaining names of potential jurors. The Court is of the opinion that this is proper and that the practice in this regard should be expanded, such as by the random selection of names from poll lists. Next, it is noted that one commissioner, in selecting suggesters, appears to have consulted, along with others, officials of one of the political parties. While a commissioner has a right to consult any person whom he reasonably believes may assist him in obtaining a fair cross section of the community for federal jury service, he should do so because of the person and not because of any political affiliation. He should, in fact, carefully avoid not only any political preference in the selection of potential jurors but also any practice which might even suggest a political influence in the selection of potential jurors. It might further be noted that one commissioner referred in his testimony to certain hypothetical considerations in the selection of jurors, which considerations, under some circumstances, might be improper. The Court, however, will not comment further in this opinion upon the propriety of these, as an examination of the commissioner's records fails to show that such considerations were actually utilized by him in rejecting prospective jurors. Finally, it is noted that the names of potential jurors have on occasion either been withheld or their use delayed under circumstances where

the commissioners deemed that an undue hardship or extreme inconvenience might be imposed upon the person. Although the occasions upon which this appears to have occurred are relatively few and there appears no discriminatory practice in connection therewith, the Court is of the opinion that the matter of undue hardship or extreme inconvenience should be left unto the Court for determination at such time as the juror may be called for service and that accordingly such matters should constitute no basis for withholding or delaying the placing of otherwise qualified jurors in the jury box.

An order will enter in accordance with this opinion.

Note: Appendices A and B to the foregoing Opinion are to be found in the Joint Appendix at pp. 83-92a, filed in this Court's Clerk's office as a part of the certified record.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1969

UNITED MINE WORKERS OF AMERICA,

Petitioner,

v.

TENNESSEE CONSOLIDATED COAL COMPANY and GRUNDY MINING COMPANY,

Respondents.

On Petition for Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF OF RESPONDENTS IN OPPOSITION

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IN THE

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OCTOBER TERM, 1969

No. .....

UNITED MINE WORKERS OF AMERICA,
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v.

TENNESSEE CONSOLIDATED COAL COMPANY
and GRUNDY MINING COMPANY,
Respondents

ON PETITION FOR CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF OF RESPONDENTS IN OPPOSITION

OPINIONS BELOW

Petitioner correctly shows that the Sixth Circuit's Opinion sustaining the jury verdict and judgment below is reported in 416 F.2d 1192. Also the District Court's Opinion sustaining the jury verdict on post trial motions appears in the record appendix at page 102, et seq.

JURISDICTIONAL GROUNDS

The jurisdictional grounds are correctly shown in the Petition. This is a Sherman Act case based on 15 U.S.C., Section 15.

COUNTERSTATEMENT OF QUESTIONS PRESENTED

1. Under the principles pronounced in *UMW v. Pennington*, 381 U.S. 657, did the Sixth Circuit and the District Court properly hold there was substantial evidence to support the verdict of the jury?

2. Did the Sixth Circuit and the District Court properly hold that the meaning of the Protective Wage Clause (PWC) was for the jury to determine?

3. Did the Sixth Circuit and the District Court properly hold that the effects and consequences of the conduct of the alleged conspirators was evidence that could be considered on the question of conspiracy?

4. Did the Sixth Circuit properly hold that the District Court's instructions on the applicable standard of proof did not constitute prejudicial error?

5. Did the Sixth Circuit err in approving the District Court's jury charge regarding:

(a) the applicable standard of proof,

(b) effects and consequences of acts of alleged conspirators,

(c) jury determination of the Protective Wage Clause's meaning and validity, and

(d) specific intent.

6. Were the Sixth Circuit and the District Court correct in rejecting Petitioner's post-trial contention that

the jury's finding under Special Issue 2 should be given the construction urged by Petitioner after the trial so as to extend it beyond the scope of the two other special issues, and bring it in such conflict with the General Verdict as to supplant the General Verdict and require reversal?

7. Did the Sixth Circuit properly hold that the damages awarded in the District Court was supported by substantial evidence?

8. Did the Sixth Circuit and the District Court properly overrule Petitioner's challenge of the jury panel?

COUNTERSTATEMENT OF THE CASE

A. The Kind of Action.

This suit seeks to recover damages suffered in the period 1960 through 1963 (4-5) by plaintiffs resulting from alleged Sherman Act conspiracy. The Pre-Trial Order (40-52) contains the plaintiffs' theory of conspiracy in detail.

Briefly, and as pointed out at the beginning of the opinion of the Court of Appeals, the plaintiffs charged that UMW and large coal companies who formed the Bituminous Coal Operators Association (BCOA) in 1950 engaged in an unlawful conspiracy in the period of this case (1960-1963) to eliminate and suppress competition and production in the coal industry and to control the Southern Appalachian and Southeastern Tennessee coal fields. The plan of the conspiracy was that only the coal operators who signed and complied with the National Bituminous Coal Wage Agreement of 1950 as amended, including the 1958 Supplement containing the Protective Wage Clause (PWC), would be permitted to carry on operations. It was alleged that

the smaller companies or companies not operating in ideal working conditions could not operate profitably under the provisions of the National Agreement; that those who did not sign were not permitted to operate, and were forced out of business; and that plaintiffs were damaged as a result of the conspiracy. It was further charged that UMW was not only operating as a labor union in this case but also had invested $25,000,000 in acquiring control of West Kentucky Coal Company and its subsidiary, Nashville Coal Company, which was one of the largest competitors on the big TVA coal market, and that UMW loans were used for operational expenses, including payments into UMW's pension fund to enable the union-owned companies to comply with the national contract while competing for the low priced TVA contracts. Plaintiffs further contend that bids made to the Tennessee Valley Authority in the late 1950's and subsequent years for coal contracts by the union-owned companies were at prices below the prices charged in their other markets and in instances were below cost. This predatory bidding aided by UMW financing was going on at the same time that UMW had the Southeastern Tennessee coal field largely closed down for not signing the national contract whose terms were made all the more impossible by such bidding and financing practices. As a result the plaintiffs lost contracts in the TVA market upon which market they were dependent, and the union-owned companies quadrupled their share in that market.

UMW denied that it engaged in any conspiracy. It asserted that all it did was to engage in traditional union activities to promote uniform wages in the coal industry for the betterment of its members.

B. The Rules for This Case Were Settled by This Court in *Pennington*; The Verdict and Judgment

The opinion of this Court in *UMWA v. Pennington*, 381 U.S. 657, bears directly upon the issues in this case and the *Pennington* opinion was instrumental in the drafting of the verdict form. The verdict form is set forth at the beginning of the Sixth Circuit opinion. The following language from the opinion of this Court in *Pennington* was of particular significance:

> "We have said that a union may make wage agreements with a multi-employer bargaining unit and may in pursuance of its own union interests seek to obtain the same terms from other employers. No case under the antitrust laws could be made out on evidence limited to such union behavior.[2] But we think a union forfeits its exemption from the antitrust laws when it is clearly shown that it has agreed with one set of employers to impose a certain wage scale on other bargaining units. One group of employers may not conspire to eliminate competitors from the industry and the union is liable with the employers if it becomes a party to the conspiracy. This is true even though the union's part in the scheme is an undertaking to secure the same wages, hours or other conditions of employment from the remaining employers in the industry." (*Id.* at 665-666).

---

2 "Unilaterally, and without agreement with any employer group to do so, a union may adopt a uniform wage policy and seek vigorously to implement it even though it may suspect that some employers cannot effectively compete if they are required to pay the wage scale demanded by the union. The union need not gear its wage demands to wages which the weakest units in the industry can afford to pay. Such union conduct is not alone sufficient evidence to maintain a union-employer conspiracy charge under the Sherman Act. There must be additional direct or indirect evidence of the conspiracy. There was, of course, other evidence in this case, but we indicate no opinion as to its sufficiency."

The parties agreed on the General Verdict Form. It was only to the insertion by the Court on its own motion of a Special Issues Form that UMW objected. UMW wanted only the General Verdict Form. (9-11, Second Supplement to Joint Appendix).

After having objected to the submission of special issues to the jury, UMW sought in post-trial motions to stretch the finding under Special Issue No. 2 (that UMW had not agreed before PWC in 1958 to impose the national contract in every unit) into being the General Verdict on all phases of conspiracy for the entire case as though that one special issue covered the whole subject of liability under the Sherman Act except for the one remaining question of the meaning of PWC. The Court clearly did not so intend, and it was the Court that got up the special issues, having received no affirmative response from plaintiffs and objections from defendant to the submission of any special issues.

The Court's thoughts on this are at 7-8, Second Supplement to the Joint Appendix:

> "THE COURT: Well, personally, I don't want to have to try this case over if I can avoid it. Well, I do not have any special issues worked out as yet, but I am still inclined to think that we had better ask some special issues.
>
> "For example, I am inclined to think that we ought to have a special issue on whether or not West Kentucky Coal Company did engage in predatory pricing of coal on the TVA market. I am inclined to think we ought to have a special issue on whether or not the protective wage clause would of itself forfeit the union's exemption, and there are perhaps one or two others that would be helpful to submit, but if I do it I will have those before we start the argument in the morning."

But the Court's special issues were not ready at the time for argument and, by agreement of counsel, argument proceeded with agreement that special issues could be completed after the argument subject to UMW's objection to submission of any special issues. (10-11, Second Supplement to Joint Appendix).

It is obvious that no one conceived that the General Verdict was to be superseded by Special Issue 2 on the broad question of conspiracy or that the General Verdict was limited to the issue of the meaning of PWC but included other asserted phases of conspiracy.

Under the General Verdict the jury found UMW did engage in a conspiracy to restrain trade as charged by plaintiffs. Under the first special issue it found UMW had lost its exemption under Sherman; under the second special issue the jury concluded that UMW did not agree to apply the national contract to every bargaining unit before PWC; but under the third special issue the jury found that by PWC in 1958 it was intended that UMW be bound to impose the national contract in all units.

The jury found damages of $977,500 for Tennessee Consolidated (TCC) and $22,500 for Grundy.

UMW then filed a motion for judgment notwithstanding the verdict and in the alternative for a new trial which the District Court carefully considered in an opinion appearing on 41 pages of the appendix (102-143).

The District Court found that the damages in the amount of $977,500 awarded to TCC by the jury were excessive and suggested a remittitur of $500,000, which was accepted by TCC. The Court then denied the motion for judgment notwithstanding the verdict and the motion for a new trial, and entered judgment in favor of TCC against UMW

in the amount of $1,432,500 and in favor of Grundy in the amount of $67,500, being three times the amount of actual damages sustained by them. The Court allowed $150,000 attorneys fees to counsel for plaintiffs.

C. The Sixth Circuit Agreed with the District Court that Substantial Evidence Supported the Jury Verdict and There was no Prejudicial Error.

In the body of its opinion under the heading "Sufficiency of the Evidence" the Sixth Circuit agreed with the District Court that there was substantial evidence to support the verdict of the jury that UMW did conspire as charged.

The Sixth Circuit also agreed that the meaning of PWC was properly submitted to the jury and there was substantial evidence to support the jury's finding under Special Issue 3 as to that meaning.

The Sixth Circuit went on to find there was no prejudicial error below and the amount of damages awarded was proper. The Sixth Circuit did observe as to the jury instructions:

> "The plaintiffs might well have objected to the court's over-emphasizing the defendant's theory of the case, but in view of the verdict in their favor they were not prejudiced."

D. Reliance of the Petition Upon the Affirmance of the Judgment for UMW by the Equally Divided Sixth Circuit in the Non-Jury Case, Ramsey v. UMW, is Unfounded; While the Records in the Two Cases are Similar, the Questions on Appeal are Entirely Different and the Unanimous Three Judge Opinion of the Sixth Circuit in This Case Was by Two Judges on UMW's Side in Ramsey.

The petition refers to, and relies upon *Ramsey, et al v. United Mine Workers*, decided about the same time as this case by the Sixth Circuit sitting in banc in a four to four decision. A three-judge panel which heard the argument in that case had decided, two to one and with a dissenting opinion, to reverse a judgment in favor of UMW entered by the District Court sitting without a jury. Then on UMW's petition to rehear in banc, and without any answer to the petition or any further argument, the Court of Appeals divided four to four and reinstated the District Court's judgment.

The Trial Judge in that case had found the preponderance of evidence supported the charge of illegal combination and agreement by UMW, but not "clear, unequivocal and convincing" proof under Norris-LaGuardia Act's Section 6.

The *Ramsey* case was a problem to the Sixth Circuit because the finder of fact, the Trial Judge, found difficulty in deciding ultimate factual issues or issues of mixed law and fact one way or the other, the Trial Judge having held the case under advisement for sixteen and a half months. The problem in that case had to do with what stage of the fact finding process should the clear proof rule be applied—should it be applied at the ultimate law and fact question or conclusion of conspiracy or no conspiracy, as well as on questions of authorization and agency, as UMW contended and as the Trial Court finally held. The Trial Court followed UMW's theory on this.

But the case at bar was decided in the same Trial Court by a jury after a charge based on the same UMW theory, and it is manifest that there was substantial evidence to support the verdict as the Trial Court and the unanimous Court of Appeals held in this case.

The Trial Court in its jury charge in this case went considerably beyond what the law makes necessary to satisfy the demands of UMW for charges of its theories. The Court of Appeals remarked about this. The charge actually called repeatedly for a finding of clear, unequivocal and convincing proof on the ultimate conclusion as to the illegal combination and agreement charged, in addition to clear proof of authorization or ratification of the clearly proven acts and activities of UMW's international officers which were relied on by plaintiff as indicating agreement and conspiracy.

No question could possibly be raised in any later petition in this Court in *Ramsey* that would help UMW's position in this case. The relief to which these plaintiffs are so clearly entitled should not be delayed.

COUNTERSTATEMENT OF FACTS

The petition does not give a reasonably accurate presentation of what happened in the coal industry, either nationally or in Southern Tennessee. It would be unfortunate if this Court took this case on the assumption that the facts were as presented in the petition, only to find on going deep into this complex record that it was mistaken in that assumption. Unfortunately in such a case as this the requirement that the parties be brief and concise in responding to a petition gives no good opportunity to set the record perfectly straight, but we can at least put the scope of the proof presented to the jury into a little better focus:

A. UMW Abandoned Its Basic Policies After 1950 When BCOA Was Established; Since Then UMW Has Cooperated in Fulfilling the Purposes of the Major Com-

bines in Not Allowing Production that Did Not Pay the Terms Negotiated by the Major Combines; Tightening Up of the Understandings in the PWC of 1958.

Before 1950 the basic policies of the union were to represent *all* and not just a small part of its members with the accompanying policy of seeking equality of working opportunity for all of the members. There was the companion policy of recognizing the need for competitive equality among producers. (306-7, 312, 344-6, 349-50, 352-3, 959-61).

The coal industry is made up of many "collective bargaining units." Before 1950, as the principal representative of the northern part of the industry in negotiating with UMW, the head of the largest company, Consolidation Coal Company (Consol), claimed that he was governed by conflicting policies. He had a purpose that his company's wage costs should not be higher than the competitors in the industry. There was the conflicting policy of recognizing at that time the interests of hundreds of smaller coal companies who then had their backs to the wall, a policy of responsible concern for those who were affected by the negotiations but whose conditions would not permit them to keep pace with Consol on wage costs. (617-21, 1516-18).

There was a crisis with the drop off in demand in the post-war years of 1949-50 and also in this period there was increasing competition from gas and oil. On both the labor side and the industry side there were discussions as to how to stabilize the industry. The industry leaders talked of setting up a czar in the person of Harry Moses (1075-6). The union urged a production control plan such as had been established in the anthracite industry (352-3). It is obvious that the czar plan won after 1950

with the establishment of BCOA under Harry Moses. Moses said as much in a talk that was recorded in the union official journal and distributed to the members (385-8).

It was only by the surrender of the concern for fair treatment of all members and abandonment of the truly responsible policies mentioned above that the union could release the brakes and plunge headlong down the road of pure and complete uniformity—the road that has benefited such companies as Consol so very much and has been so disastrous to the lesser companies and to the great majority of union members who found there were no terms allowed which were practical in the places and conditions where they found themselves.

Since BCOA was formed in 1950, UMW has worked in concert with the purpose of major companies to have the national contract terms including repeated flat increases applied to all companies (376-82, 1923-7). Under BCOA a new bargaining technique was formed. A two-man bargaining team worked out this series of flat, across-the-board, wage increases (376-80, 385-8). Other bargaining units lost their freedom and become automatically subject to the BCOA contracts (1480-6). These increases were tailored to fit ever-increasing mechanization (388-9).

A mechanical revolution occurred after 1950 under a contract tailored to the latest machines. Men were replaced by machines and unemployment became rampant. Coal communities and areas where mechanization was difficult became blighted (196-9, 389-92, 1530, 1975).

Protests of union members in the conventions of the union about the policy which was forcing so many out of jobs went unheeded by union officers. One delegate pointed out there were 291 local resolutions asking for

wage classification and only 90 asking for general wage increases. Yet, with convention approval, the flat blanket wage increases went on (394-404).

The differentials in wages which were the policy of the union before the 1940's were fair and equitable but the flat increases across the board since 1949 are extremely unfair. It is obvious that there is complete economic regulation of the industry by allowance of flat increases applicable to every job, regardless of its nature, in an industry like coal. The labor law and the *Pennington* opinion of this Court do not authorize this type of labor contracting without bargaining. The authorities require bargaining unit by unit.

The unfairness and the unreasonableness of this situation is just as plain as the comparison of the 115 cubic-yard shovels usable in some coalfields (389, 607) run by a handful of men that can produce trainloads of coal in a day, with the underground pick and shovel miners necessary in some of the narrower segments of coal in the fingers of the plateau of Southern Tennessee (176), or a comparison of the ease with which big continuous miners can be used in the thick and regular Pittsburg seam (390-1) with the difficulties of adapting even the smallest of machinery in the thin and irregular Sewanee seam of Southern Tennessee (172). When companies replaced many men with a few big machines, flat increasing wage scales mean very little to them.

Whole communities, whole areas of the country for many decades have been dependent upon all these varying conditions of mining. So when a combination moves in to say that everybody will conform to a contract tailored to fit the constantly improving techniques used by those in the most favored conditions, that combination is con-

demning to "blight" (see *Ramsey v. UMW*, 265 F. Supp. 428) and death the economy of whole regions and sentencing the population of those areas to unemployment. This is exactly what has happened to a great part of the regions of the coal industry, while other regions of the industry never had it so good. This is why the older system of differentials was fair. This is why the system of flat, blanket across-the-board wage increases constantly applied is so unfair and why it becomes more and more unfair the higher it gets. This is why there has been a mechanical revolution in coal with a fantastic increase in productivity per man per day with a consistent enormous drop in the number of jobs and mass unemployment (196-9, 1530, 1975).

There was a recession in coal in 1958 and the Protective Wage Clause (PWC) was added to the National Bituminous Coal Wage Agreement to tighten the screws of the UMW-BCOA combination. Many of the UMW representatives out in the field had friends who wanted to work, and there was the responsibility of getting contracts signed in impossible situations. Unquestionably there was considerable "sweethearting," tacit deals between local producers and UMW field representatives that the printed and signed contract was a sham to get the field representative off the hook, and that the arrangement of terms by the local producer with his own men would suffice. In many localities the UMW field man is the UMW. This became so pronounced among the small truck mines of Southern Tennessee (not by these plaintiffs) that UMW district officers had to come down in 1955 to make a special kind of arrangement over the whole field to let the sweetheart deals stand "for old business", but to enforce welfare obligations under the contracts with respect to coal under "future coal contracts." This is discussed later.

Mr. Moody, head of the Southern Coal Producers Association, in 1958 consulted with the midwest associations about a proposed form of the PWC. Also BCOA and UMW were exchanging drafts of the PWC (1490-1, 1938-40). The operator associations were demanding commitments from UMW to eliminate the possibility of the local companies out in the field escaping the contract terms. UMW counsel characterized the resulting PWC as a "quid pro quo." Operators demanded the UMW promise contained in Paragraph A. UMW demanded the operator promise contained in Paragraph B (1078).

The PWC is set forth in the Appendix (1931-7).

The men who were responsible for this clause being inserted in the contract, the three heads of the major associations and the three international union officers, formed the Joint Industry Contract Committee to police the clause throughout the industry. This committee sent out demands to all the companies who had contracts with the union that they send back certification of compliance; that is, that they were paying the national contract scale and welfare royalty and had "complied fully with the other provisions of the national agreement." *These demands were sent out to every company who had any kind of contract with the union.* Hundreds of companies did not send back the certifications, and, after a second letter of warning, formal determinations and blacklistings were made and recorded of violation of the Protective Wage Clause on the part of 1328 coal operators across the country (418-9, 423-4, 467-8, 470-1).

At this point it is well to observe the effect of a decade of the application of the UMW-BCOA national contracts. We have already commented upon the rampant unemployment. On the employer or management side, in the year

1959, the combined corporate industry excluding the two largest companies (Consol and Peabody Coal Company) suffered a $12,467,613 loss while paying $105,209,688 simply as welfare fringe benefits under the national contracts. That same year the said two largest companies had combined net profits of $43,039,613 (1527-8). The share of national coal production enjoyed by the big mines (Class I mines producing 500,000 tons or more annually) had substantially improved. In 1947 this percentage had been 41.5; in 1948 it dropped to 38; in 1949 it fell to 29.3. But by 1959 it had climed to 49.9.

B. Effects of the UMW-BCOA Combination on the Southern Tennessee Coalfield.

The Southern Tennessee coalfield is known as the Sewanee seam. The coal averages 36 inches in thickness and is extremely irregular in thickness. There are rolls and squeezes in the rock surrounding the coal. Newly developed mining machinery generally comes out in sizes suitable for thicker and regular seams of coal and it is not until much later that prototypes are developed for thinner seams such as the Sewanee seam. A sand-rock conglomerate in the roof over the Sewanee seam makes it difficult to roof bolt and maintain roof control. All of these things created difficulties in mechanization and attaining a high rate of productivity (156-172).

By far the largest market for Southern Tennessee coal companies is the TVA steam plant system. Southern Tennessee competes with the West Kentucky field for this market. With respect to this competition a witness for the union testified in this case:

"The important difference between the two fields is not therefore in wages and benefits the workers receive,

but rather in the difference in productivity ... A Southern Tennessee miner produces ten tons per day and a Western Kentucky miner twenty tons. On this basis the labor cost on a ton of Tennessee coal is about twice as high, perhaps as much as $2.50 a ton versus $1.25 plus $.40 in each case for the UMW welfare fund. Such a difference is indeed a serious matter to the Southern Tennessee producers, especially as wages increase." (1457)

This statement of facts has already become lengthy and in order to shorten this statement we turn now to a summary of the effects of the UMW-BCOA contract in Southern Tennessee as made by the same Trial Court in another case (*Ramsey v. UMWA*), which case had substantially the same record as this case (114). In *Ramsey* the Trial Court made the following conclusions:

"Upon review of the evidence as it relates to the Southeastern Tennessee coal field and of the U.M.W.'s activities therein, the following conclusions appear to be clearly supported by the evidence:

"(1) To operate successfully the producers in the Southeastern Tennessee coal field must be able to compete and survive on the T.V.A. coal market. Since 1954 50% or more of all coal produced in the State of Tennessee has had to find its market with the T.V.A. That figure reached as high as 78% in 1956 and by 1962 was still at 64.3%.

"(2) Due to the geological conditions, the Southeastern Tennessee coal field cannot achieve a level of productivity equivalent to that of its principal competitors on the T.V.A. coal market. This competitive disadvantage is offset in part by the transportation and

quality advantages which the field has over its principal competitors in the T.V.A. market at the Widow's Creek steam plant.

"(3) In the period since 1960 the coal operators in the Southeastern Tennessee coal field have been unable to compete and survive in the T.V.A. coal market under the National Bituminous Coal Wage Agreement. While in many instances this appears to have been due to antiquated mining methods and equipment or other causes, the fact nevertheless remains that since 1960 there has not been a single instance of a successful coal mining operation in the Southeastern Tennessee coal field under the National Bituminous Coal Wage Agreement and this in spite of the fact that the only feasible alternative facing most coal operators in the area was to operate under the national contract or go out of business." (*Ramsey v. UMWA*, 265 F. Supp. 388, 430)

So the UMW-BCOA contracts were impossible in Southern Tennessee and in 1962 these contracts were cancelled across the field. The operators offered terms with differentials based on the type of mining conditions and mechanization for each mine and UMW refused every offer but would take only the national contract (434-5, 696-8, 1106-10). An unending strike began. Concerning this strike the *Ramsey* opinion says this:

"The failure to reach a contract was the overriding reason, however. While it does not appear that the U.M.W. called the strike, it is clear that it sanctioned and approved the strike.

"The strike, which commenced on December 26, 1962, was accompanied by mass picketing at the road junctions leading to the major mine areas in the field.

This strike was still continuing in 1965 at the time that proof was taken for this trial. The U.M.W. has continued support of the strikers by relief payments. Grundy Mining Company did not operate again until October 8, 1963, although it attempted to open in May of 1963 but was prevented from doing so by mass picketing. By February of 1963 all mines on Tennessee Products property had ceased operation due to the strike. No mining on these properties had been resumed by 1965. A great deal of violence, bloodshed and destruction of property has accompanied the strike. Much suffering, deprivation and want has occurred. The Southeastern Tennessee coal field remains a blighted area.

* * *

"With respect to the strike which occurred on December 26, 1963, and which has been in effect since that date, the evidence is clear that the U.M.W. has sanctioned and approved the strike. The Union concedes as much. It is likewise clear that the strike has been accompanied by much mass picketing, violence and property destruction. Both sides in the dispute have suffered the effects of such violence, but the operators and those miners who sought to cross the picket lines have suffered much the worse of the violence. Without attempting to itemize the record, it may be said that homes were shot into, burned or dynamited by unidentified assailants. Coal was dumped upon the highway. Trucks and cars were fired upon numerous times. Power poles and mine equipment were dynamited. Coal tipples were burned and mine guards were fired upon. Operators were forced to abandon their mines and equipment for reasons of personal safety, with the mines and equipment suffering

heavy losses from mine flooding and vandalism. Several men were killed. One intrepid operator was the intended victim of dynamite thrown into his yard from a speeding car, but he seized the lethal bundle and removed the cap just seconds before it went off. While it certainly adds no luster to the occasion, there were victims to violence upon both sides. The home of the U.M.W. District Representative was damaged by dynamite. Four local union halls were burned. Union men were shot at and union homes were burned." (*Ramsey v. UMWA*, 265 F. Supp. 388, 428-9)

C. The Interest of UMW as an Investor and Owner in the Competition Between Southern Tennessee and West Kentucky.

UMW began buying West Kentucky Coal Company stock in 1952 and by 1958 had possession of over half of the voting stock (508-11, 554-6, 1954). The peculiarities of the transactions whereby these interests were acquired are dealt with in the testimony of Mr. Cyrus Eaton (522, et seq.) and Mr. Barnum L. Colton (540, et seq.).

Mr. Lewis testified that UMW "was conscious of the intrinsic value of the West Kentucky coal stock and familiar with its reserve assets ... It had over a billion tons of reserve coal adjacent to the river, strategically located in the center of the steam coal consuming market at the present and in the future." (937)

Profits to be made from these investments were to be split by UMW and Mr. Eaton, fifty per cent to each (936).

The union-owned companies were able to triple their share of the TVA business in the period from 1958 to 1964 (1961).

In this period UMW was bidding for and contracting with TVA to sell the coal at prices far below the prices that West Kentucky and its subsidiary in Nashville charged for coal in the other markets (593-5).

While this competitive struggle was going on the union came to the aid of its companies, West Kentucky and Nashville, with loans of $900,000 to enable them to pay for welfare fund obligations under the National Bituminous Coal Wage Agreement (1660).

D. The History of Plaintiffs Through the Period of Strife, Strikes and Damages — 1960 Through 1963.

Because of its losses and failures in trying to raise productivity with heavy expenditures for the latest and best machinery usable in its coal seams, at the beginning of 1960, TCC cancelled its UMW contract effective in March, 1960. The mine continued to operate on limited business, until work stopped on the effective date of the cancellation in March, 1960 (206a-207a). In the meantime, a series of meetings were held in Knoxville, Chattanooga and Palmer, Tennessee, between the company and representatives of the Union. The company displayed its financial situation and appealed to the union to modify the national contract terms so that wages could be paid on some form of incentive basis, or determined on the basis of productivity, so that wages would be lower than UMW scale for low productivity, but higher if productivity were high enough. The upshot was complete rejection by the union and demand for the national contract (207a-213a, 688a-691a).

Having no hopes for reopening Coal Valley, Tennessee Consolidated turned to its newly created subsidiary, the plaintiff, Grundy. Grundy then in 1960, after the failure

of Tennessee Consolidated's efforts to negotiate a contract, turned to Paul Gibbs, and he attempted to start with new men without a UMW contract. This brought on a real uproar that is dealt with in *Gibbs v. United Mine Workers*, 383 U.S. 715. That suit was based on violence. This effort ended in failure.

By this time, the Bee Branch and Floyd Hollow TVA contracts of the truck mines on TCC property expired and in the ensuing turmoil and lengthy picketing there was no new business for the truck mines (448a).

Now in August, 1960, the squeeze that Southern Tennessee found itself in was tightened with a new and greatly reduced Section 22 all rail rate from Western Kentucky direct to Widow's Creek. So starting in the fall of 1960 the price ceiling over the principal market was a very concrete fixture, as even UMW's principal witness on this subject finally had to agree after a great deal of hedging. This was in the middle of the period when West Kentucky Coal Company (with loans from UMW to enable it to pay its welfare royalties) increased its share of TVA business from about one million to four million tons per year (1461a-1469a, 1961a). Two times in testimony in this case the President of that Company took credit for getting the new Section 22 rate to Widow's Creek (566a, 1337a-1338a). The tremendous increase of shipments of that company to TVA were all at a $2.90 FOB mine price. This was the lowest of the company's prices in this period, considering all of its large contracts, including many other utility contracts, even those for carbon and screenings (592a-593a, 1260a-1264a). Most of its other sales were very substantially above $2.90. Previous efforts at getting at West Kentucky's cost figures were blocked (588a-589a). But at the trial of this case it strongly appears figures of cost of the TVA coal could not be substantiated and the

attempt to establish a profit for it results in the odd claim that all the company mines selling the high priced coal were losing money and the two mines largely devoted to TVA business at the lowest price were making money (1300a, 1303a-1304a). But regardless of actual cost, and regardless of prior decisions of the Trial Judges in *Second Pennington* and *Ramsey* about there being no "predtory pricing," there was a ceiling set low enough for Southern Tennessee to leave no room to operate on top of the high cost floor of UMW's national contract. It was UMW's company that actually got the advantage of additional business when UMW refused to adjust that floor.

The fall of 1960 rolled around in Southern Tennessee with still no production. Management was under the injunction of the stockholders not to exhaust the mineral and financial assets of the company with further heavy losses (216a). But the outlook was darker because the reduced rail rate from West Kentucky to Widow's Creek market became effective in the fall of 1960.

The Company appealed directly to its old Coal Valley employees rather than through their union, to come to work at real good wages but not UMW scale. Production still was impossible although many were interested (216a-219a).

It is to be observed, as UMW points out, that the company had been criticized, not only by UMW, but by TVA, on the general ground that low productivity could only be the result of poor management. So Tennessee Consolidated, in early 1961, went out and got the best managers in the business—Allen & Garcia Company, to see if it could operate in Southern Tennessee *under the UMW contract* (219a).

Allen & Garcia is *the* outstanding coal mine construction and operating firm in the industry. The appendix gives a picture of the truly extraordinary qualifications and experience of this company all over the world (732a-737a).

Allen & Garcia was employed on the basis that TCC would be responsible for the cost and expense of operations and Allen & Garcia would plan and supervise operations and be paid a commission on coal produced (745a). Allen & Garcia was acting as agent for TCC (748a).

On the recommendations of Allen & Garcia, TCC spent another $475,000 for new mining equipment (643a).

TCC now, at the December 7, 1961, TVA bid opening, put in bids to TVA for two contracts, one for the large mine being put into operation by Allen & Garcia, and one for the truck mines. The computation of bid prices in these bids reflect how important was the ceiling imposed by the West Kentucky Coal Company series of bids. In February, 1961, West Kentucky had filed a bid for a million tons a year for 10 years to TVA at $2.90, giving TVA an option to take an additional million tons. TVA had taken the first million of this offer and in December, 1961, the option for the second million was still dangling. (TVA elected to take this option tonnage December 28, 1961) (583a-586a).

So for the December, 1961, bid TCC officers had to compute their bids strictly on the basis of getting as close to, but under, the West Kentucky option tonnage bid as possible. This is what they did and the two bids were successful (699a-703a, 872a-877a).

We have commented above upon the excellent reputation and experience of Allen & Garcia all over the world. But

in this Southern Tennessee venture, it failed dismally, trying to operate under the National Bituminous Coal Wage Agreement.

The reasons are two: FIRST, the irregular and treacherous natural conditions in the seam of coal, the day to day experiences in which Allen & Garcia had encountered nowhere else; and, SECOND, the clamor of the men (mostly up in years) on the old Coal Valley panel for jobs on the new and fast, mobile machinery, regardless of age and ability to be trained (638a-642a, 679a-681a, 745a-746a, 749a, 755a). But there was no chance to comply with the national contract unless this kind of machinery could be used.

This is precisely the problem that stems directly from trying to design bargaining units or units of production around a national contract dictated from outside, rather than bargaining for terms that fit the unit so that both the company and its employees can live with each other, as contemplated in the Labor Relations Act.

In August and September, 1962, the operations under Allen & Garcia were in turmoil with picket lines stationed at mine entrances and in September, 1962, Allen & Garcia cancelled the UMW contract and resigned from the operation (450a, 672a-673a, 739a-740a).

TCC again attempted to carry on with Grundy acting as operating agent. At this same time the truck mines were closed because UMW cancelled its contracts with those mines and the Welfare Fund withdrew welfare cards from the men (433a-434a, 454a-455a).

When Grundy took over in October, 1962, UMW filed a petition for representation election for the Grundy mine. At a meeting in Nashville the company advised the union

that the union would have to make some changes (1092a), and later advised UMW by letter that when UMW was certified as bargaining agent at Grundy's mine, the company's representative in negotiations would be Sewanee Coal Operators Association (1093a).

The Sewanee Association was composed of a number of truck mine operators and TCC and Grundy were "qualified" members (709a). In the "negotiations" of this Association with UMW, TCC loaned its vice-president and secretary, Mr. Houston Beaumont, a lawyer. One of the classes of mines for which terms were proposed covered the Grundy mine, No. 11. At these negotiations, in a series of four meetings, October, 1962 to January, 1963, the operators made concrete proposals of terms varying with the different kind of mines and operating methods used in the field. UMW's response was to say it would take 10 cents more an hour wage and 10 cents more per ton welfare than the national contract, finally saying it would take the national contract (434a-435a, 696a-698a, 1106a-1110a).

These "negotiations" failed and the UMW district president wrote a letter to TCC demanding the national contract, accusing TCC of trying to "sweetheart" and carrying on "vicious" conduct in attempting to negotiate labor costs below those its competitors had to pay (1111a-1114a). The competitor who had put the ceiling on the market was the company owned by UMW to whom UMW was loaning $900,000 so it could pay its welfare obligations.

December 26, 1962, pickets in the hundreds closed the mines (435a, 451a). The UMW district field representative was at the picket line (436a-437a). The unending strike began. There can be no doubt that the District Court in *Ramsey* was right in finding that the "blighted"

condition that came then to this three-county area was from failure of efforts to reach a contract, and the Court correctly characterizes the almost open warfare and destruction that ensued. (See 265 F. Supp. 428-429).

These things were still going on at the end of the damage period in this case (December 31, 1963) with UMW writing editorials encouraging the strikers and paying the men for not working, with funds from the international treasury (286a-288a, 762a, 860a-869a).

As a direct result of these things, TCC and Grundy were injured in their business and property.

ARGUMENT

I. There Is No Substantial Federal Question Presented By The Petition That Was Not Answered By This Court in *UMW v. Pennington*.

The answer to the question of the scope and effect of the antitrust law and the labor law on an industrywide contracting combination of union and business groups was given by this Court in *UMW v. Pennington*, 381 U.S. 657. Congress has not acted in this field since that time and there is no reason as far as this case is concerned for the Court to review the propositions enunciated in that opinion.

A. There Was Substantial Evidence to Support the Jury Verdict as Held by the Sixth Circuit and the District Court.

Our Counterstatement of Facts above, and the opinions of the courts below, must be our answer to UMW's proposition that the verdict was not supported by substantial

evidence. It would amount to detailed repetition to go over those facts again. There was an abundance of evidence to support a finding of violation under the opinions of Justice White and Justice Douglas in *Pennington*.

B. The Sixth Circuit and the District Court Properly Held That The Meaning of PWC Was for the Jury.

The PWC is set forth at 1931-7.

We submit that the following statement from the opinion of the Sixth Circuit is correct:

> "UMW contends that the protective wage clause is clear and unambiguous and therefore the construction of the clause is for the court and not the jury. *Dale v. Preg*, 204 F.2d 434 (9th Cir. 1953). The trouble with this contention is that every court which thus far has undertaken to construe the clause has held it to be ambiguous. Judge Wilson so stated in *Ramsey* (265 F. Supp. 388 at 412), and in the present case. Judge Taylor in *Pennington* said: 'The language in Paragraph A may not be as clear as it might be.' 257 F. Supp. 815 at 862. On appeal, we held in *Pennington*: 'The Protective Wage Clause is capable of two reasonable constructions ...' 400 F.2d at 814.
>
> "Whether the terms of the contract are ambiguous is a question of law for the court to determine. *Steele v. McCargo*, 260 F.2d 753 (8th Cir. 1958). When the court has determined that the contract is ambiguous the terms of the contract are to be determined by the jury if the case is tried by a jury, or by the court if the case is tried by a court. Evidence of the surrounding circumstances and the practical construction of the parties is admissible to aid in its interpretation.

United States v. Continental Oil Co., 364 F.2d 516 (10th Cir. 1966); *Steele v. McCargo, supra*; *Hawkins v. Frick Reid Supply Corp.*, 154 F.2d 88 (5th Cir. 1946)."

The foregoing cases also support the proposition that if a contract is obscure or ambiguous in its terms, extrinsic evidence as to the surrounding circumstances, including the practical construction given by the parties, may be received in aid of its interpretation.

The principal point in UMW's argument is that courts have applied a rule that the law favors the construction that does not result in a violation of law. But this is only one of a number of rules of construction.

The trier of fact does not get to the rule that favors construction resulting in legality until he applies other rules that have more to do with the central issue of what the parties actually intended—such as the necessity of examining the entire contract and not just one part, and the circumstances surrounding the making of the agreement, and the practical construction of the agreement by the parties who made it.

Thus, the primary rules of construction of ambiguous writings requires an examination of surrounding circumstances and practical construction by the parties. It is when these basic rules fail to come up with an answer that the "secondary" rules—such as that favoring a lawful result—come into play. *Restatement of Contracts*, Secs. 230, 235, 236.

UMW seems to place next heaviest reliance upon what *UMW's witnesses said in this case* that the PWC meant.

It must be said that the resort to "practical construction by the parties" means an examination of their over-

all conduct while working in harmony under the terms of the agreement—not what they say it means when disagreement arises and self interest impels one or the other to take a particular position. (17 Am. Jur. 2d 683-5, Contracts, Section 274)

In line with this is the rule that "oral statements of the parties of what they intended it to mean" is the one thing that cannot be considered in interpreting writings, *Restatement of Contracts*, Section 230.

So the denials and the explanations about PWC by UMW witnesses in this case are not entitled to the controlling weight ascribed by UMW. *To the contrary, they should be given no weight under applicable rules.*

C. The Sixth Circuit Properly Held That the District Court's Instructions on the Effects and Consequences of the Conduct of the Alleged Conspirators Did Not Constitute Prejudicial Error.

UMW contends that at some parts of the charge the jury would be permitted to consider effects and consequences of UMW conduct in considering the question of conspiracy. Many cases have said that looking at course of conduct is the only way that conspiracy can be proved in the normal Sherman Act case. In seeking to remove this case from the normal rule UMW relies upon the Supreme Court decision in *Pennington* that a union may vigorously pursue wage uniformity. But the Court did not add the words "even though it stops bargaining unit by unit and destroys most of the competitors in the industry and unreasonably restrains trade, giving tremendous benefits to the big companies with whom it fixes the contracts." The Court reconciled these two concepts in its footnote 2 which reads:

"Unilaterally, and without agreement with any employer group to do so, a union may adopt a uniform wage policy and seek vigorously to implement it even though it may *suspect* that some employers cannot effectively compete if they are required to pay the wage scale demanded by the union. The union need not gear its wage demands to those which the *weakest units* in the industry can afford to pay. Such union conduct is *not alone sufficient evidence* to maintain a union-employer conspiracy charge under the Sherman Act. There must be additional direct or indirect evidence of the conspiracy. There was, of course, other evidence in this case, but we indicate no opinion as to its sufficiency." (Emphasis supplied.)

UMW contends a union can go on making national contracts with the dominant company until there is no one else left in the industry — regardless of effects, regardless of reasonableness.

Outside of predatory pricing by union-owned companies, *Pennington* relied upon the effects and consequences of the national bargaining on a single small marginal coal producer. There was apt reason for the language used by the Court in that second footnote on the first record. The present record deals with the most modern and largest producer in Southern Tennessee and this record goes far beyond *suspected* effects upon the *weakest* units. The undisputable statistical proof warrants, indeed demands, a finding that the combination is pressing printed forms of contract upon an industry which, all joined together (omitting the two largest companies), loses millions of dollars a year after paying the extravagant costs required in the printed forms, including over $100,000,000.00 simply as Welfare fringe benefits (while the two largest companies prosper).

The second footnote to the *Pennington* opinion does not say that *suspected* effects on the *weakest* units of an industry are immaterial on the question of conspiracy or that they may be ignored. Rather, it says such proof "is not alone sufficient evidence." The inference is that *suspected* effects on, not only the *weakest*, but some of the stronger units, or well known effects on even the weakest units *may* be alone sufficient. But certainly the inference from the footnote is strong that obvious, well known, well recognized effects on the great bulk of an industry is alone sufficient proof that the agreements which the union has made with the same group of employers over a period of a decade violate the antitrust law.

D. The Sixth Circuit Properly Held That the District Court's Instructions on the Applicable Standard of Proof Did Not Constitute Prejudicial Error.

We submit that the District Court's instructions on "clear proof" under Section 6 of the Norris-LaGuardia Act leaned far over in defendant's favor and went far beyond anything that the act contemplates. The opinion of the Sixth Circuit refers to the many times that "clear proof" rule was stressed and stretched in the instructions. The Sixth Circuit points out that plaintiffs might well have objected to the way the District Court over emphasized the rule.

Clearly, if this jury charge can be said to be unfair to defendant on burden of proof, then Section 6 of Norris-LaGuardia must be considered for all practical purposes as being an outright prohibition of any suit at all. Congress surely did not intend for it to be that.

E. The Sixth Circuit Was Correct in Holding There Was No Error in the District Court's Instructions to the Jury.

The contentions of the UMW under the fifth question are really a repetition of arguments that pertain to the first four questions discussed above.

F. UMW is Clearly Wrong as to the Scope and Meaning of the Verdict on Special Issue 3; It Would Serve No Good Purpose to Review the Decisions Below on This Point.

As shown in our statement of the case UMW sought to have the Court submit only the general issue. The Court wanted special issues on several things; one particular point he mentioned concerned pricing policies of West Kentucky Coal Company. But UMW objected. The Court was going to get up special issues and submit them to counsel. Time for argument came and the special issues were not ready. Counsel agreed to go ahead and argue and let the Court submit the Special Issues later. Argument was aimed at the General Verdict Form and covered a predatory conspiracy with PWC argument mixed in. After argument the Court distributed the special issue form and submitted it to the jury along with the General Verdict Form. The charge of the Court covers a predatory conspiracy as well as PWC.

It cannot be logically contended that the second special issue covered the broad issue of predatory conspiracy or that the case submitted to the jury under the General Verdict Form was confined to the meaning of PWC. The contention is obviously too strained.

We submit the following statement of the Trial Court, quoted by the Sixth Circuit, is correct, sound and dispositive of this contention:

"In considering the general verdict, the Court must look to all of the evidence and not merely the evidence in regard to the P.W.C. Moreover, in arriving at their general verdict the jury was charged with the duty of determining whether the defendant had committed an antitrust violation during the period of September 24, 1959, through the end of 1963, the period of limitations of this lawsuit. Evidence of conduct prior to September 24, 1959, was relevant only as it may or may not have reflected upon what the defendant did or refrained from doing during the period following September 24, 1959. Thus, neither Special Issue No. (2), wherein the jury found the defendant had not conspired prior to the 1958 Amendment with any coal operators to impose the conditions of the National Bituminous Coal Wage Agreement upon other coal operators, nor Special Issue No. (3), wherein the jury found that the defendant intended by the language of the P.W.C. to commit itself to impose the National Bituminous Coal Wage Agreement on all coal operators with whom it thereafter negotiated, would necessarily be determinative of the general verdict on the issue of liability. The Court is accordingly of the opinion that there does exist substantial evidence in the record in support of the jury verdict on the issue of liability." (121)

G. The Sixth Circuit Properly Held That the Damages Awarded in the District Court Was Supported by Substantial Evidence.

UMW does not challenge damages generally, but only those damages attributable to the period of the strike starting in December, 1962, and continuing through the end of the period of the case, December 31, 1963.

UMW's first position under this is that the strike resulted from a refusal of Grundy to bargain. This is an inaccurate characterization of the true situation. Grundy's first attempt to open production in 1960 came only after long, frustrating efforts by the parent company to negotiate with the defendant with rejection of those efforts. The second attempt in 1962, after the resignation of Allen & Garcia, opened up with a meeting in Mr. Harwood's office in Nashville, described by the defendant's District President (1091, 1122), in which Grundy officers pointed out that it was impossible to sign the national contract and the union would have to allow other terms if a contract were signed. After all, this was after a year and a half of failure in trying to work the property under the national contract under supervision of Allen & Garcia, a nationally prominent engineering firm.

The Company received not the least bit of reciprocation or encouragement from the union with respect to this completely unavoidable and reasonable proposition. The union demanded the national contract or nothing. As a matter of fact that is all UMW could do under PWC. The union maintained an NLRB petition for recognition election creating a legal snarl-up over the appropriateness of Grundy bargaining through a representative (Sewanee) representing a different bargaining unit (708). But, Grundy's officers helped out in the honest efforts of Sewanee Association to bargain (694), and Grundy's Mine No. 11 was one of the types of mines covered in the Sewanee proposals to the union (1107). It is unreasonable to expect any more from Grundy. At least the jury thought so and this was certainly a reasonable conclusion.

In the second place, UMW claims that plaintiffs' damages for this period is premised "on the theory that Consolidated and Grundy would have earned the amounts

claimed had they been privileged to pay in wages and benefits what they were prepared, unilaterally, to establish, but which neither UMW or its members were willing to accept."

But this is not an accurate analysis of the theory of the case or of damages. The theory of the case is that the proximate cause of damages is the conspiracy preventing bona fide wage negotiation, contrary to the whole intendment and purpose of National Labor Policy, and the cause of damage is not the unwillingness of the men themselves to negotiate a practical set of conditions (there were delegations from local unions, for instance, going to district headquarters seeking to get higher authority to allow practical contracts in the field (280-281, 504), and local unions all over were sending resolutions to the international's conventions to get wage classification rather than flat wage increases, without success (395)). The proximate cause was a question for the jury. The amount of damage was likewise for the jury and the jury could reasonably consider the profit-making ability of TCC *before* and *after* the damage period when plaintiffs *did* have employees working for them for wages those employees were willing to accept, but when a strike to force the national contract was not being stirred on by international funds and editorials.

We do not see that the remand by the Supreme Court of the *Pennington* case for a second trial on liability and damages could have contemplated any impropriety or weakness in these theories or would afford room for successful argument of UMW's present contention in this regard.

H. The Sixth Circuit and the District Court Properly Overruled Petitioner's Challenge of the Jury Panel.

The Trial Court overruled UMW's motion to strike the jury panel, filing an opinion that is in the appendix (76-92). That opinion is so thorough and completely responsive to the contentions raised by UMW under this question that we have concluded it would serve no worthwhile purpose to seek to improve upon the analysis contained in that opinion.

UMW's contention is: " . . . that on the April, 1967, panel there was a dramatic under representation of craftsmen, service workers and laborers as compared with the professional and managerial classes."

We say categorically that this allegation simply is not true. The specific ground of the motion relied on here by UMW is that there was under representation of "wage earners, members of labor organizations and people who belong to the working or employee part of the population." (75)

UMW relies on census statistics but the Court pointed out that UMW was not using the appropriate comparisons but was only using statistics of the wage earner group as compared to the management and executive group, without comparing the wage earner group with the entire adult population from which the jury is drawn (78).

The UMW classification of the jury panel as to economic position is challenged by the jury commission analysis (78), and the analysis made by the Court attached to the opinion (83-92). There is no evidence to dispute the findings of the Court in this regard.

The Trial Court used the "Key Man" system of jury selection (this was before the recently adopted jury se-

lection rules). The Sixth Circuit's opinion points out that numerous cases have upheld the key man system.

However, just to make sure that there is no misunderstanding on the real facts in this assault upon the system of jury selection as practiced in this District Court, we feel compelled to point to the voir dire in this case which would undisputably be the best evidence of the character of the jury panel, since the only previous basis of making a comparison was from very sketchy information on the juror record. As UMW acknowledged in its footnote of its brief in the Sixth Circuit (P. 90) ". . . the cryptic occupational descriptions on the panel list may leave some room for argument." In answering questions on a form a prospective juror may be considerably more vaguely expansive as to his job than when asked specific questions on voir dire in the courtroom.

The voir dire covered a substantial part of the panel list and is in the appendix (1833-1878).

The voir dire establishes that the jury that decided the case was composed of one local union officer (Duncan), three other union member wage earners (Chambers, Bates and Roberson), a former local union officer (Davis, now a foreman), a former union member who is still a millwright (Nelson), a farmer (Corvin), a federal government employee who was a former school teacher (Burnett), a retired school teacher (Nix), a salesman (Hammel), and two housewives (Hall, whose husband is a farmer, and Allen, whose husband is a mill credit manager). Obviously, the wage earner "class" was fairly represented.

As to the members of the jury panel list who were examined and excused during the course of the voir dire, it is to be observed that plaintiffs used only one peremptory challenge and that was on a member of UMW District 50

(Bennett) when plaintiffs' challenge for cause was overruled. *UMW challenged peremptorily a union member wage earner* (*Hammond*), a salesman (Gladish) and an engineer (Greer). *UMW made one challenge for cause, a union member wage earner* (Lawhorn, who had consulted one of counsel for plaintiffs about an auto case). One union member wage earner was excused by the Court because he said his union "did not see eye-to-eye with UMW" (DeVault). One wage earner (a chair maker, Kennedy) became sick during the trial and was replaced by the alternate, Nix. The economic position of the few other excused panel members was not developed.

This is the picture as to what "classes" were represented on the panel list when those on the list were submitted to specific questioning. *We say flatly that UMW's assault on the jury selection processes of the Court are untrue and unfounded.*

CONCLUSION

For the reasons discussed above, Respondents submit that the Petition for a Writ of Certiorari should be denied.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 1163

UNITED MINE WORKERS OF AMERICA,

Petitioner,

v.

TENNESSEE CONSOLIDATED COAL COMPANY and GRUNDY MINING COMPANY,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITIONER'S REPLY TO OPPOSITION BRIEF

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IN THE

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ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITIONER'S REPLY TO OPPOSITION BRIEF

FOREWORD

TCC and Grundy[1] do not challenge UMW's contention that the Sixth Circuit yielded to their contention that UMW should have abandoned its historic policy of uniformity of labor standards, acceded to plaintiffs' demand they be subsidized at coal miners' expense and afforded a wage advantage over competitors derivative from regional collective bargaining. Instead, they press upon

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[1]The parties and pagination references will be referred to herein as they were in the certiorari petition. In addition, the Opposition Brief is referred to as "Br."

this Court *two fallacious positions* which *conflict* with this Court's prior important decisions relating to labor's exemption from the antitrust laws:

1. Though conceding under *first Pennington*[2] that UMW could lawfully "make wage agreements with a multi-employer bargaining unit and . . . in pursuance of its own union interests seek to obtain the same terms from other employers" (381 U. S. 665), TCC and Grundy complaints (Br. 21) of UMW failure "to modify the national contract terms so that wages could be paid on some form of incentive basis, or determined on the basis of productivity, so that wages would be lower than UMW scale for low productivity, but higher if productivity were high enough", that "the older system of differentials was fair" and that "across-the-board wage increases constantly applied is so unfair" (Br. 14), make it evident they seek this Court's adoption of a policy that *business competition be based upon wage competition*—a theory rejected by this Court's *Apex Hosiery Co.* v. *Leader*, 310 U. S. 469, and consistently followed since 1940. Indeed, adoption of such a policy "*is not national policy*",[3] according to *first Pennington's* concurring opinion of Justices Goldberg-Harlan-Stewart (381 U.S. 711).[4] Nor do respondents[5] challenge UMW's citation of the district court's *Ramsey* (265 F.Supp. 431), affirmed by the Sixth Circuit (416 F.2d 655), which condemned their thesis (Pet. 30-31). Indeed, the Sixth Circuit's *Bale* v. *Glasgow Tobacco Board of Trade, Inc.*, 339 F.2d 281, 287, held "*It is not the purpose of the Sherman Act to guarantee an investor a profit . .*"

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[2]*Pennington* v. *UMW*, 381 U. S. 657 (1965).

[3]Unless otherwise indicated, all emphases are supplied.

[4]This concurrence is found at the conclusion of the majority opinion in *Meat Cutters* v. *Jewel Tea Co.*, 381 U. S. 676, at pp. 697, *et seq.*

[5]References to respondents are to TCC and Grundy.

2. That respondents urge upon this Court that *effects and consequences* may be substituted for proof of an anti-competitive conspiracy, despite this Court's rejection of such a thesis (Pet. 41-45), is evident from their complaints concerning effects and consequences found at pp. 13-14, 15-20 and 21-27 of their Opposition Brief. The Sixth Circuit's affirmance of *Ramsey* carried with it the district court's rejection of effects and consequences in its assertion that "No clear antitrust significance can be drawn from" statistics showing that two large coal producers had profitable operations while the rest of the industry suffered a loss (265 F.Supp. 409-10).

Crucial omissions and inaccuracies in statements and arguments prompt petitioner's instant reply, in which petitioner will follow the sequence used in the Opposition Brief.

UMW'S REPLY TO RESPONDENTS' COUNTERSTATEMENT OF QUESTIONS PRESENTED

Questions presented by UMW (Pet. 3-4) appropriately set forth the questions involved herein.

UMW'S REPLY TO RESPONDENTS' COUNTERSTATEMENT OF THE CASE

A. The material covered (Br. 3-4) concerns TCC and Grundy's conspiracy charges. It inadequately relates UMW's theories contained in its certiorari petition (p. 5).

B. The jury's answer to Special Issue (2) was not restricted to exonerating UMW of conspiracy charges *"before PWC"*, as respondents urge (Br. 7), but the jury's *actual* finding was that *"prior to and apart from"* the 1958 Agreement, UMW did not conspire with signatory operators to contract with non-signatory operators

only upon the National Agreement's terms (Pet. 6). This alleged *restriction* of the jury findings occasioned UMW's complaint in both lower courts that the jury findings had been misinterpreted, discussed in the certiorari petition, pp. 9-12, 16-17.

C. Though TCC and Grundy accurately recite (Br. 8) the Sixth Circuit's agreement with the district court there was substantial evidence to support the jury finding, they ignore the district court's expressed doubts concerning the jury verdict, UMW's challenge to the Sixth Circuit's characterization of the evidence as conflicting and its test standard, and UMW's contention that substantial evidence under *first Pennington, Gibbs* and the Sixth Circuit's *second Pennington* and *Ramsey*[*] means *clear, unequivocal and convincing proof.* TCC and Grundy ignore also UMW's charge (Pet. 7-8) that denials of a conspiracy by UMW officials and other witnesses were *undisputed* and that *Ramsey* (265 F.Supp. 388) exonerated UMW of the alleged conspiracy.

D. The Sixth Circuit decided the instant case on *September 19, 1969.* Its affirmance of the district court's *Ramsey* (265 F.Supp. 388), by an equally divided court, came *September 26, 1969* (416 F.2d 655).

TCC and Grundy accurately state (Br. 9) the Sixth Circuit *originally* in a 2 to 1 decision (Circuit Judge Edwards dissenting) reversed the district court on the ground that a *preponderance of evidence* was sufficient to support the conspiracy charge. However, Judge Edwards' dissent appropriately noted the majority opinion overruled the Sixth Circuit's *second Pennington,* ignored *first Pennington's* standard of proof and opened

[*] *Pennington* v. *UMW,* 381 U. S. 665; *UMW* v. *Gibbs,* 383 U. S. 715, 736, (1966); *Lewis* v. *Pennington,* 400 F.2d 806, 814; *Ramsey* v. *UMW,* 416 F.2d 665, 661-62.

the door to practical elimination of the exemption accorded labor unions under Section 6 of the Clayton Act (15 USCA 17).

Ramsey's district court opinion did not state upon what facts it premised its conclusion UMW impliedly committed itself to BCOA to bargain only upon the National Agreement's terms, nor did it hold this would constitute a *Sherman* violation. The original majority opinion ignored *Ramsey's* further and contrary district court finding that *"The only direct evidence in the record is to the effect that the Union pursued such policy upon its own, and not in agreement with any employer"* (265 F.Supp. 412) and *"All of the direct evidence in the record expressly denies the plaintiff's contentions of a conspiracy"* and *"Every officer of the Union who testified, as well as every representative from the coal industry alleged to be in on the conspiracy, denied its existence"* (p. 432).

Hence, upon UMW's petition for rehearing en banc, which was granted, the Sixth Circuit, by an equally divided court, affirmed the district court's *Ramsey* (416 F.2d 655).[7] The issue over which the court divided was whether *Norris-LaGuardia's* Section 6 requires all elements of a cause of action for antitrust violation to be proved by "clear proof" where a labor union is a defendant, as held in the Edwards dissent, or whether the statute's "clear proof" standard is limited "to the determination of the authority of 'individual officers, members, or agents' to act for a labor union or other organization", as the O'Sullivan opinion contended (416 F.2d 667).

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[7]Circuit Judge Edwards' affirming opinion was concurred in by Chief Judge Phillips and Circuit Judges Peck and Combs. The opinion of Circuit Judge O'Sullivan for reversal was joined in by Circuit Judges Weick, Celebrezze and McCree.

The O'Sullivan opinion read the "black letter title", reading, "Responsibility of officers and members of associations or their organizations for unlawful acts of individual officers, members, and agents" as clearly exposing the Section's limitations (416 F.2d 667). However, the O'Sullivan opinion overlooked two crucial factors: First, the Sixth Circuit's *second Pennington* (400 F.2d 814) had already held that an anticompetitive conspiracy must be established by "clear proof", citing *Gibbs* (383 U.S. 715), and second, following the Sixth Circuit's adoption of its "clear proof" rule, this Court denied certiorari in *second Pennington* (393 U.S. 983), one question submitted being the applicability of the "clear proof" rule.[6]

Since a question posed in the instant case is whether the Sixth Circuit erred in holding that *Norris-LaGuardia's* Section 6 does not require the unlawful act of conspiracy, upon which this action is based, to be shown by "clear proof", further discussion is found herein, *post*, p. 16.

UMW'S REPLY TO THE COUNTERSTATEMENT OF FACTS

UMW's certiorari petition (pp. 21-31) covers either the facts of the instant action, or *Ramsey's* and the jury's findings of the various factors pertaining to the charged conspiracy. Since, concededly, *Ramsey's* facts and those herein are substantially identical (Pet. 7), it is noteworthy that *Ramsey's* affirming opinion recites, "The District Judge's analysis of the evidence . . . is masterly",

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[6]In *second Pennington's* certiorari petition (Case No. 558, October Term, 1968), Question 4 read thus:

> "Is a Sherman Act case, based on a national contracting combination of union and business groups, to fail because of the proof of specific intent being held insufficient to satisfy Norris-LaGuardia's 'clear proof' rule when there can be no question of authorization, ratification and participation in the industry-wide bargaining?"

covering "52 pages of Volume 265 of Federal Supplement" (416 F.2d 663).

A. Respondents' charge (Br. 10-16) that UMW abandoned its basic policies after 1950 when BCOA was established, and cooperated in fulfilling purposes of major companies in not allowing production that did not pay the terms of UMW's contract, notably *does not challenge, but ignores* undisputed, positive denials that UMW entered into any agreement other than the collective bargaining agreement, and UMW's historic policy for national uniformity of labor standards (Pet. 21-23). Respondents' charges (Br. 11-13) concerning stabilizing the coal industry, BCOA's formation, and the development of a new bargaining technique, mechanization and the "repeated flat increases", are all matters of which the jury exonerated UMW of the alleged conspiracy (Pet. 9). Respondents' emphasis on the wage increases in the post-1950 period invites *Ramsey's* finding that such increases "have not been out of line with wage increases in the other basic industries" and "In fact, there were fewer increases in the coal industry from 1950 through 1958 than in the steel, automotive, copper, rubber and oil industries" (265 F.Supp. 408). Moreover, *Ramsey* rejected respondents' contention that "wage scales negotiated in the national contract and its amendments were tailored to further an unlawful conspiracy to suppress or eliminate competition . . ." (p. 408).

TCC and Grundy fail to tell this Court that, *undisputably,* UMW had nothing to do with BCOA's formation, its membership was open to all operators, large or small, and when formed it represented 262 individual coal companies, *of which number one-half mined less than 100,000 tons a year* (1505a).

Respondents' charge (Br. 11-12) that in the post-1950 period UMW changed its basic policy of representing all and not just a part of its members, with the accompanying policy of seeking equality of working opportunity for all members, finds a ready response in the concurring opinion of Justices Goldberg-Harlan-Stewart in *first Pennington,* which records UMW's openly-stated preference, "if need be, for a reduced working force in the industry, with those employed working at high wages, rather than for greater total employment at lesser wage rates", recognizing that existence of marginal operators "does not serve the best interests of the working miner but, on the contrary, depresses wage standards and perpetuates undesirable conditions" (381 U.S. 698).

Respondents' claim (Br. 11) of policy change by major companies, by pointing to a statement that Consolidation Coal Company had a purpose in seeing that no competitor paid lower costs than that company, does not bespeak a conspiracy to run operators out of the industry, but only a desire to remain in the industry. "The anti-trust laws do not require a business to cut its own throat" (*Brown* v. *Western Mass. Theaters, Inc.,* 1 Cir., 288 F. 2d 302, 305).

The effects and consequences to mining communities, unemployment, losses in the coal industry and profits of "two largest companies" therein (Br. 14-16), stressed by respondents, and their inefficacy as proof of an anti-competitive conspiracy where a labor union is charged, has been demonstrated (Pet. 43-44; *ante,* p. 3).

B. Respondents' long quotation from *Ramsey* (Br. 17-18), dealing with competition in the southeastern Tennessee coal field on the TVA market, geological condi-

tions and the inability of coal producers therein to compete and survive in that market, must be compared with *Ramsey's* holdings that "*Neither the nature of the competition, the coal seam characteristics, the comparative adaptability to mechanization, nor other factors enhancing the problems of marginal coal producers can compel wage differentials or form a basis for a court altering the legislatively permissible . . . policy of . . . wage uniformity*" (265 F.Supp. 408) and "*the economic pressures created by technological advances and the competition engendered thereby do not equate*" a *Sherman* violation (p. 409). Indeed, *Ramsey* professes *Sherman* "is designed to keep the market open so that competitive pressures may operate" (p. 409). Nor may the long quotation be isolated from *Ramsey's exoneration of UMW, in both lower courts, from the charged conspiracy.*

Ramsey's quoted holdings respond fully to respondents' complaint (Br. 18) that UMW's contract was impossible in southern Tennessee.

In complaining of strike activity (Br. 18-20), respondents ignore UMW's citation (Pet. 37) of *Hunt v. Crumboch*, 325 U.S. 821, 824 and *Apex Hosiery Co.* v. *Leader*, 310 U.S. 469, 503, declaring *Sherman* does not condemn strike activity.[9]

C. Respondents' discussion of UMW's interest as investor in West Kentucky Coal Company (Br. 20-21) ignores *first Pennington's* concurring opinion of Justices Goldberg-Harlan-Stewart that even ownership of a controlling or substantial interest in a company is

[9]It is appropriate to note that while *Ramsey* involved violence, in the instant action the district court specifically observed that *no violence was involved herein* (Pet. A. 45a).

not a *Sherman* violation, absent evidence that the owner "participated knowingly and actively in the alleged illegal activity" (381 U.S. 734). UMW's certiorari petition's discussion (pp. 25-26) of West Kentucky investments shows, *inter alia*, that *numerous witnesses testified UMW played no part in West Kentucky's management or pricing policies; and there is no contradiction thereof. Even respondents' counsel conceded UMW did not control West Kentucky's marketing policies* (1650a).

UMW's response to respondents' charge that West Kentucky tripled its share of TVA business in the 1958-64 period (Br. 20) is found in *Ramsey's* findings that its pricing to TVA "was a matter of business judgment, and not predatory pricing, to depress the T.V.A. coal market" and that West Kentucky offered coal to other utilities at the same price (265 F.Supp. 421), which is consonant with the district court's *second Pennington* (257 F.Supp. 815, 863). Both *Ramsey* and *second Pennington* had Sixth Circuit affirmance (416 F.2d 655; 400 F.2d 806).

D. TCC points (Br. 21) to failure to raise productivity in 1959, notwithstanding "heavy expenditures" for machinery,[10] as the basis for cancellation of its UMW contract in 1960. While it is factual TCC failed to increase productivity, TVA cancelled its long-term contract by reason thereof, and thereafter TCC cancelled its UMW contract, the district court found "no reasonable relationship" between this failure "and any Sherman Act violation" by UMW (A. 69-70a).

TCC refers (Br. 22) to a 1960 Section 22 rail rate from the western Kentucky coal field to TVA's Widows

[10]TCC's efforts to achieve higher productivity in this period were viewed by TVA as "indefinite" and "inadequate" (249-50a).

Creek steam plant (the plant to which TCC sold coal) and a "price ceiling" resulting at that market. These matters need to be brought into focus. In 1960, the Interstate Commerce Commission approved a lower rail rate to Widows Creek—the so-called Section 22 rate—*on application of TVA and L & N Railroad,* and over TCC's strident opposition. *Neither UMW nor West Kentucky Coal Company played any part in the Section 22 rate* (272-83a, 1342-45a, 1440-41a, 1464a). *Ramsey* held (265 F.Supp. 422), "since it involves an appeal to a governmental agency, it could not involve a *Sherman*" violation, citing *first Pennington.*

As already noted (*ante,* p. 10), the evidence is positive UMW played no part in West Kentucky's pricing policies, a fact acknowledged by respondents' counsel. Furthermore, as noted (*ante,* p. 10), district courts in both *second Pennington* and *Ramsey* found the bids motivated by legitimate business considerations.

TCC points (Br. 23) to its employment of engineers Allen and Garcia in 1961, which UMW discussed in its certiorari petition (p. 28). While TCC points (Br. 26) to what it terms an "unending strike", it fails to point out its contribution to the strike's duration which included, even after UMW certification, Grundy's refusal to discuss UMW's proposal to work out a temporary agreement by which the men would return to work pending negotiations (289a, 1111-14a, 711a, 1105a).

UMW's REPLY TO RESPONDENTS' ARGUMENT

I. THE INSTANT CASE PRESENTS AN IMPORTANT AND SUBSTANTIAL FEDERAL QUESTION.

Notably, respondents do not challenge UMW's contention that the Sixth Circuit's opinion herein heralds the destruction of industry-wide, multi-employer collec-

tive bargaining in its preference for regional bargaining, thwarts Congressional will and national labor policy, nullifies the Congressionally-granted exemption to labor unions and collides with this Court's *first Pennington, American Federation of Musicians* v. *Carroll*, 391 U.S. 99, and *Apex*, 310 U.S. 469 (Pet. 31, *et seq.*). Nor do respondents challenge any of UMW's reasons for Granting the Writ herein (Pet. 31-50).

Two court-tried cases (*Ramsey* and *second Pennington*) exonerated UMW of conspiracy charges while three jury-tried cases resulted in large money judgments against UMW.[11] These variant results emphasize the warning of Justices Goldberg-Harlan-Stewart against permitting juries to roam at large in the area of collective bargaining to become "arbiters of the economic desirability of the wage scale in the Nation's coal industry" (Pet. 32-33). If the enormous judgment herein is permitted to stand, the jury trial, employing the Sixth Circuit's techniques herein, will serve as a ready pattern in other pending cases (Pet. 48, fn. 28), as well as other litigation invited thereby, to make labor unions generally, and UMW specifically, easy prey in antitrust cases and for harassing, punishing and ultimately destroying UMW, which has existed for 80 years as the chosen bargaining agent for more than 80% of miners in the bituminous coal industry, for lawfully performing its right and duty as such, only because of local juror hostility to UMW's established and historic union policy of seeking to improve working and living standards for its members on a uniform and industry-wide

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[11]The instant case involves *$1,660,000.00*, as a result of a jury verdict against UMW and Consolidation Coal Company; UMW now faces a *$7,566,356.00* judgment in *South-East Coal Company v. UMW* (Pet. 48, fn. 28) [Consolidation Coal Company's appeal is now pending in the Sixth Circuit as Case No. 19,622]; and *first Pennington* which this Court reversed (381 U.S. 657).

basis. Indeed, the Sixth Circuit's *second Pennington* (400 F.2d 819) contains an admonishment against this precise hostility! The variance of result herein with that in *Ramsey* stresses the threat. Without the award of certiorari and judicial guidance, the jury verdict herein adverse to UMW leaves counsel for unions and management alike in a perplexing situation as to how labor agreements on an industry-wide, multi-employer basis may be achieved without subjecting their respective clients to long and exorbitantly expensive antitrust litigation.

In addition to the Reasons set forth in UMW's certiorari petition (Pet. 31-50), this Court has heretofore recognized that importance of preserving for litigants their right to a jury trial, particularly where a federal statute is involved, would warrant the award of certiorari to determine if the jury function of drawing inferences from proven facts has been respected. *Wilkerson v. McCarthy,* 336 U.S. 53, 55, 70-71.

A. The Substantial Evidence Issue.

UMW's certiorari petition (pp. 37-41) challenges the Sixth Circuit's approval of the jury verdict on the premise it was supported by "substantial evidence".

No challenge is made of UMW's contention that the Sixth Circuit's characterization of the evidence as *conflicting* was inaccurate (Pet. 8-9, 32). No challenge of the material submitted by UMW (Pet. 37-41) to support its challenge of the Sixth Circuit's approval of the jury verdict is found in respondents' brief. Neither do respondents respond thereto (Br. 27-28).

Respondents fail to point to any evidence which meets the clear, unequivocal and convincing standard of proof required to prove a labor union's liability under *Sher-*

man. Their emphasis on "effects and consequences" demonstrates their lack of that type of evidentiary support and that respondents' "claimed existence" of the conspiracy is to be "found in constant assertion" by them and their counsel *"rather than in the proof". G. & P. Amusement Co.* v. *Regent Theater Co.*, DC, N.D. Ohio, 1952, 107 F.Supp. 453, 461.

B. The Issue Concerning PWC.

UMW has answered (Pet. 34-37) respondents' contention that the lower courts properly held PWC's meaning was for the jury (Br. 28-30). Respondents do not challenge UMW's contention that such sanction conflicts with prior decisions of this Court and the Sixth Circuit's *second Pennington* and *Ramsey.* Their brief offers no response that Sixth Circuit citations are inapposite (Pet. 36).

Respondents are not impressive in or arguing (Br. 29), it is necessary to examine the entire contract, the circumstances surrounding its making and its practical construction by the parties who made it, since all three components emphasize its validity: (1) PWC's history (Pet. 23-24) demonstrates its validity. (2) Witnesses agree, *without contradiction* (Pet. 21-35), UMW agreed with no operator UMW was prevented from negotiating or executing a contract on terms different from the National Agreement or UMW would impose that Agreement's terms upon employers other than those bargaining at a particular time—testimony accredited by both *Ramsey* and *second Pennington.* Respondents' citation of 17 Am. Jur. 2d, Contracts, Section 274, pp. 683-85, does not support their contention that parties' statements of what they intended PWC to mean cannot be considered in interpreting the instant Agreement.

That Section recites: *"In the determination of the meaning of an indefinite or ambiguous contract, the construction placed upon the contract by the parties themselves is to be considered by the court . . . since the parties are in the best position to know what was intended by the language employed"* and *"It is to be assumed that parties to a contract know best what was meant by its terms and are the least likely to be mistaken as to its intention . . ."* Respondents' vice president and secretary and an attorney *concedes* Tennessee operators were told "All issues are negotiable" (Pet. 21). (3) Undisputed evidence pertaining to the JICC minutes (Pet. 24-25) does not establish a *Sherman* anticompetitive agreement.

Significantly, respondents fail to answer UMW's observation that PWC's current status is one of validity (Pet. 24) as a labor standards clause under Section 8(e), Labor Management Relations Act, 1947, as amended (see Appendix hereto, p. 23). They ignore this Court's rejection of the illegality *per se* doctrine of collective labor agreements. Since employers and unions are required to bargain concerning wages, hours and working conditions, conduct permitted by federal statutes "is not to be declared a violation of Federal law". *Allen Bradley Co.* v. *Local 3, Electrical Workers,* 325 U.S. 797, 806 (1944).

Absent any evidence of illegal *Sherman* conduct, it was error for the Sixth Circuit to sanction the district court's submission of the issue of PWC's meaning and validity to the jury, and to approve that verdict.

C. The Issue Of Effects And Consequences.

Answers to respondents' contentions (Br. 30) that the Sixth Circuit properly held the "effects and consequences" instruction did not constitute prejudicial error

are found in UMW's certiorari petition (pp. 41-45) and herein (*ante*, pp. 3, 8).

D. Issues Concerning "Clear Proof."

Respondents make no response to UMW's charge (Pet. 15) that the Sixth Circuit erred in holding that *Norris-La Guardia's* "Section 6 does not state that the unlawful acts must be shown by clear proof" (A. 17a). UMW assigned the Sixth Circuit's error as a basis for granting the Writ herein (Pet. 45-56).

The Sixth Circuit's error is manifest from language in *United Brotherhood of Carpenters* v. *U.S.*, 330 U.S. 395, that Secton 6's *"purpose and effect was to relieve organizations, whether of labor* or capital, and members of those organizations *from liability for damages or imputation of guilt* for lawless acts done in labor disputes by" individual officers or members thereof, *"except"* as Section 6 states, "upon clear proof" of the union's "actual participation in, or actual authorization of" unlawful acts "or of ratification of such acts after actual knowledge thereof" (330 U.S. 403). *Carpenters* recites *'Our only point is this: Congress in §6 has specified the standards by which the liability of employee . . . groups is to be determined"* (p. 410). Though *Carpenters* involved criminal proceedings, this does not detract from its primary holdings that Section 6 *is binding "upon all courts* of the United States *in all matters* growing out of labor disputes covered by the Act". *Gibbs* (373 U.S. 736) professes Section 6's general applicability in noting that Congress was selective in deleting its applicability from certain sections of the Labor Management Relations Act, 1947, and in rejecting any outright repeal thereof.

Contrary to respondents' claim the Sixth Circuit herein properly held district court's instructions on the ap-

plicable standards of proof did not constitute prejudicial error (Br. 32), actually the Sixth Circuit's opinion (A. 17-22a) fails to include the district court's *return to the "preponderance" rule*, telling the jury that on the charge of monopoly UMW "has monopolized, within the meaning of the antitrust laws, if it appears *from a preponderance of the evidence* . . . that first they knowingly combined or conspired either to obtain or to maintain the power either to remove or exclude, or to keep out competitors . . ." and "Monopolization may be found to exist whenever it appears from a preponderance of the evidence" (1725a).[12]

While the district court undertook to clarify and correct its "clear proof" charge as the Sixth Circuit noted (A. 20-21a), it failed to answer UMW's contention that the district court's phrase, *"as I have charged you originally"*, is an obvious reference to the *preponderance rule* given in the initial discussion on standard of proof. The Sixth Circuit's sanction of the charge on standard of proof fails to meet its own requirement in *Sessoms* v. *Union Savings & Trust Co.*, 6 Cir., 338 F.2d 752, 759 (1964) that *"where there is an erroneous instruction, it should be corrected by a positive statement of the court that the instruction in question was erroneous and is specifically corrected by the later instruction"*. In the instant case, the last reference to the preponderance rule appeared at p. 1725a; and the Sixth Circuit's opinion demonstrated (A. 20-21a) that the attempted corrective charge appeared at pp. 1760-61a—a separation of at least 35 pages. A separation of "some forty pages" caused the Fifth Circuit's *Paramount Film Distributing Corp.* v.

[12]It is noteworthy that the Sixth Circuit's opinion on standard of proof contains excerpts from the jury charge found at pp. 1720-23a and then skips to pp. 1760-61a, omitting the foregoing material on p. 1725a.

Applebaum, 217 F.2d 101, 125 to condemn an attempted correction of a jury charge.

The charge as a whole on standard of proof will leave this Court, as it must have left the jury, in *total uncertainty* as to what principles the district court was attempting to explain, but in a state of certainty that what it charged varied with the Sixth Circuit's *second Pennington's* requirement of "clear proof" of *predatory intent.*

E. The Issue Of Specific Intent.

UMW's certiorari petition (pp. 16, 46-47) complained the district court erred in charging it was *not necessary* for UMW to have a "specific intent to establish a monopoly or *destroy competition*". The Sixth Circuit regarded this error as *one not meriting discussion* (A. 22a). Despite UMW's demonstrating the Sixth Circuit's sanction collides with *second Pennington's* (400 F.2d 814) requirement that *predatory intent is essential*, respondents fail to respond thereto.

F. The Issue Of Misinterpretation Of The Jury Verdict.

Answers to respondents' contention (Br. 33-34) that UMW is clearly wrong concerning the district court's misinterpretation of the jury's General Verdict and the Sixth Circuit's answer thereto are found in its certiorari petition (pp. 6, 16-17).

UMW has already pointed out that the jury's Special Issue (2) finding exonerated UMW of the charged conspiracy "*prior to and apart from*" the 1958 Agreement (*ante*, pp 3-4). PWC's relevancy to the General Verdict becomes clear in colloquy preceding the district court's submission of Special Issues to the jury. In overruling UMW's objections (1767a), the district court posed the

inquiry, "suppose that the Court has made some error in respect to" PWC, "how are we going to know how the jury decides the case?" (Second S.A. 1-8)[13] and avowed that "special interrogatories" should be submitted *"so that you will know, if possible, on what any verdict is based"* (Second S.A. 7).

The jury's exoneration of UMW of conspiratorial conduct *"prior to and apart from"* the 1958 Agreement directly conflicts with the district court's opinion and the Sixth Circuit's sanction that the General Verdict reflected "all of the evidence and not merely" that which related to PWC (A. 57a). Both render meaningless UMW's jury exoneration that *"prior to and apart from"* PWC it had not conspired in violation of *Sherman*. Further, the jury's Special Issue Finding (1) that UMW exceeded its labor exemption integrates all three Special Issue Findings and reflects the jury's General Verdict on liability that UMW engaged in a conspiracy "outside or beyond the exemption granted by the antitrust statutes to a labor organization" (Pet. 6). Had the two lower courts upheld UMW's contention, it would have obviated the necessity of considering any evidence other than that which dealt with PWC. UMW's demonstration of error with reference to PWC (*ante*, pp. 14-15) affords full showing that entry of judgment for UMW pursuant to its directed verdict motions and for judgment n.o.v. would have been appropriate.

Pertinently, respondents do not challenge UMW's contention (Pet. 17) the Sixth Circuit misconceived Rule 49(b), Federal Rules of Civil Procedure and erred in its other holdings pertaining to its contention that error

[13]This reference is to the "Second Supplement to Joint Appendix filed By Defendant-Appellant, United Mine Workers of America", filed in this Court as a part of the certified record.

existed in the district court's misinterpretation of the jury's General Verdict and the Sixth Circuit's approval thereof.

G. The Issue Of Damages.

Respondents deny (Br. 35) the 1962 strike resulted from Grundy's refusal to bargain with UMW and refer to an October, 1962 meeting in which Grundy's officers discussed an agreement with UMW. The meeting's purpose, however, was not negotiation of the new agreement, but to determine whether Grundy would honor the balance of the Allen and Garcia-UMW agreement. This Grundy agreed to do. There was discussion of a successor contract, but on these terms: the company attorney threatened, "if UMW didn't do something different the company would file a suit". Two days later the company filed a suit against UMW for 6 million dollars (1092a). The fact is that from the day Grundy took over until this day, with the exception of the October meeting, Grundy has refused to meet or negotiate with UMW. Initially, Grundy insisted it would not meet until NLRB certification, but after certification it continued to decline to meet, even though UMW indicated a willingness to work out a temporary agreement whereby the employees would return to work (1111-14a, 289-90a, 711-13a, 1105a).

It was under these circumstances that union employees of Grundy entered upon a strike in December, 1962, and it was the losses sustained by respondents by reason of their refusal to work that accounts for the principal element of damages recovered by TCC in this action. The measure of damages was what TCC said it would have earned in the strike period as shown by what TCC earned after it was able to add new employees—

replacing the strikers—to their payroll, train them and work them at a wage *which it alone determined* and which was substantially below the scale the striking employees were willing to accept. Nothing in this Court's *first Pennington* remotely suggests approval of such a measure of damages. Its approval by the courts below manifestly warrants this Court's rejection.

H. The Jury Panel Issue.

Facts pertaining to UMW's motion to strike the jury panel and the Sixth Circuit's sanction of the district court's refusal to do so appear in the certiorari petition (pp. 18-20, 49-50). To challenge UMW's argument that the lower courts erred in refusing to sustain UMW's position, respondents point to the jury's composition deciding the case (Br. 38), which UMW submits evidences a basic misconception of principles relating to the issue: *"The focus of the law is on the list from which the jury is drawn and not on the composition of a particular jury . . ."* *Rabinowitz* v. *U.S.*, 5 Cir., 366 F.2d 34, 59 (1966).

CONCLUSION

For the reasons assigned in its Petition for Certiorari and herein, UMW prays that the Petition for Writ of Certiorari should be granted and that the writ issue to review the judgments, orders and opinion of the Sixth Circuit entered in Case No. 18,820. Petitioner intends to urge each of the points and questions presented, though not argued herein.

Respectfully submitted,

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APPENDIX

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29 USCA 158(e) [Sec. 8(e), Labor Management Relations Act, 1947, as amended]:

(e) It shall be an unfair labor practice for any labor organization and any employer to enter into any contract or agreement, express or implied, whereby such employer ceases or refrains or agrees to cease or refrain from handling, using, selling, transporting or otherwise dealing in any of the products of any other employer, or to cease doing business with any other person, and any contract or agreement entered into heretofore or hereafter containing such an agreement shall be to such extent unenforcible and void.

* * * * *